

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS. CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8 VOLUME 2

9 Transcript of Combined Motions to Suppress
10 Proceedings and Daubert Hearings before The Honorable
11 James O. Browning, United States District Judge, Las
Cruces, Dona County, New Mexico, commencing on
December 19, 2017.

12 For the Government: Ms. Maria Armijo; Mr. Randy
13 Castellano; Mr. Matthew Beck

14 For the Defendants: Mr. Brock Benjamin; Ms. Cori
15 Harbour-Valdez; Mr. Patrick Burke; Mr. Robert Cooper;
16 Mr. Jeff Lahann; Mr. Orlando Mondragon; Mr. Billy
Blackburn; Mr. Scott Davidson; Ms. Amy Jacks; Mr.
Richard Jewkes; Ms. Amy Sirignano; Mr. Christopher
Adams; Mr. Marc Lowry; Ms. Theresa Duncan; Ms. Carey
Bhalla; Mr. William Maynard; Ms. Justine Fox-Young;
17 Mr. Donovan Roberts; Ms. Lisa Torraco; Ms. Angela
18 Arellanes; Mr. Jerry Walz

19 For the Defendants (Via telephone): Mr. James Castle
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SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

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201 Third NW, Suite 1630
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(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

1 THE COURT: All right. Good morning
2 everyone. It looks like everybody has an attorney
3 this morning. Let's see, Ms. Duncan, your paralegal
4 Erin Glasser is calling in. Ms. Glasser, are you on
5 the phone, yet?

6 MS. GLASSER: I am, sir.

7 THE COURT: All right. Ms. Glasser, good
8 morning to you.

9 Any other changes in counsel, people that
10 are here? Do I need to note any?

11 All right. Mr. Adams, I talked to Ms. Wild
12 last night. It appeared that what you were trying to
13 tell me is encompassed in a document that Ms.
14 Sirignano had filed. Am I missing something? Am I
15 not tracking what you're trying to tell me? What I
16 understood you were trying to tell me -- and if I'm
17 wrong, tell me -- but is that you had some documents
18 from Christopher Garcia's drug case, or some motions
19 that you wanted to pull into this case, and I need to
20 hear them. Those are the motions to suppress, that
21 we fully heard, and I need to give you an opinion on
22 those. I think I orally gave you rulings on those,
23 but you wanted me to take a look at those again, give
24 you a more detailed findings of fact and conclusions
25 of law. Is that what you were trying to tell me?

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1 MR. ADAMS: That is most of what I was
2 trying to tell you. I did want to point out one
3 document or one issue in particular that you did not
4 rule on. And if I may, we did a suppression motion.
5 We filed a motion to suppress a three-hour statement
6 in the 15-4275 case.

7 THE COURT: That's the drug case?

8 MR. ADAMS: Yes, sir. Our motion to
9 suppress was 184, the Government's response was at
10 226, and our reply was at 246789. We had a full-day
11 hearing on May 4, 2017, and the transcript is at ECF
12 264. We also -- with Joseph Sainato, the Special
13 Agent testified -- we also incorporated testimony
14 from Sergeant Lerner about -- from April 13, 2017.
15 And that transcript is at ECF 254. And in that one
16 he had talked about driving Chris Garcia; arresting
17 him, driving him over and Chris Garcia said, "Gorence
18 is my guy." And he knew Gorence to be a lawyer. In
19 the interrogation, the first 16 minutes took place
20 pre-Miranda. And Joseph Sainato said he'd forgotten.
21 But he'd been trained to do Miranda, but he'd also
22 been trained it's okay to get him talking first, was
23 the testimony.

24 They came in and said, "Tell us about the
25 Marcantel hit, tell us about SNM, who ordered it, et

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1 cetera, et cetera. When we got to the argument part
2 of the case, you had pressed the Government on:
3 Well, what are you trying to use? And they pointed,
4 Ms. Armijo pointed to comments on page 199 of the
5 transcript. And you --

6 THE COURT: That's after the gap?

7 MR. ADAMS: That was about two-and-a-half
8 hours after the Miranda. And your impression at the
9 time -- and you never did a written order on this --

10 THE COURT: Right.

11 MR. ADAMS: -- you said, you know, my view
12 just sitting here is I really need to dig into the
13 case law on this. My gut is telling me that Chris
14 Garcia really seemed like he wanted to talk. You
15 know, how does that factor into the equation? And
16 the stuff about the drugs didn't come up at all until
17 so much after the Miranda. It's not like when this
18 issue comes up in the other context, which I took to
19 mean, in 4268, and in the 16-1613 case.

20 So that was the issue. And then we pled in
21 the drug case before an order was drafted. So I
22 think even if your written order had been consistent
23 with what your gut was that day, that this issue for
24 this case would have been different, because the
25 pre-Miranda material was all about the SNM

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1 enterprise, all about the leaders of the gang, and
2 all about who ordered the hit, and who had
3 involvement in the Gregg Marcantel conspiracy.

4 So, our view is, even if you'd ruled
5 against us before, which you never did, we think this
6 pre-Miranda stuff so taints the rest of the statement
7 that none of it should be admissible.

8 THE COURT: Now, is that document one of
9 the ones on Ms. Sirignano's list?

10 MR. ADAMS: Yeah.

11 THE COURT: Okay. So I know I owe you that
12 work.

13 My mind is -- and this will be my ruling,
14 unless this is one of the ones I take a look at
15 reconsidering, is the statement after the Miranda
16 warnings are admissible; the ones before are not
17 admissible. And that's the way I'll cut it. If
18 y'all -- if this one goes to the top of the list and
19 this is one you want me to spend some time with, then
20 I will.

21 MR. ADAMS: I can certainly tell you
22 without consulting any of the other defense counsel,
23 this is at the top of our list. We would love to get
24 a written opinion. And if we have a disagreement, it
25 can be resolved somewhere else in one day, I suppose.

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1 Thank you very much.

2 THE COURT: I think I got the opinion out
3 yesterday on defendant Daniel Sanchez' motion to
4 sever or reconsider. So that came out yesterday if
5 you didn't see it.

6 Ms. Harbour-Valdez, I think I cut you off a
7 little bit at the end of the day because I was trying
8 to get everybody out of here. What did you need to
9 bring up?

10 MS. HARBOUR-VALDEZ: Your Honor, we were
11 going to ask if the Group 2 motions in limine could
12 be put off until closer to our trial, to devote the
13 time that we have now to the Group 1.

14 THE COURT: Have you talked to Ms. Wild
15 about that?

16 MS. HARBOUR-VALDEZ: That's what I thought
17 we had talked to her about last week, that all the
18 individual Group 2 motions in limine were going to be
19 pushed aside. The ones that were dealing with
20 everyone, like the motions in limine that were filed
21 on behalf all defendants, would be taken up while we
22 were together.

23 THE COURT: Well, let's see if she's on the
24 phone. Ms. Wild, are you there?

25 THE CLERK: I am. But I could not hear

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1 anything that Ms. Harbour-Valdez just said.

2 THE COURT: Well, let me summarize it for
3 you, because it's fairly important, given that the
4 motion I'm holding in my hand to take up next is Mr.
5 Troup's motion in limine on bad acts. I was going to
6 use it as the way to start getting into this thing.
7 But what Ms. Harbour-Valdez is saying, can we take
8 off the motions in limine of the Group 2 defendants,
9 ones that are going to be tried in April, and just
10 focus on the ones for the Group 1, and then also the
11 ones that are general that go to both. The list of
12 motions in limine that you gave me were not so
13 segregated, so I was wondering what your thoughts and
14 understanding was.

15 THE CLERK: Well, first, the listing was
16 just the order in which I believe that they were
17 filed. The reason that I prepped you for everything
18 was because of generalities, and to maybe try and use
19 the Court's resources most efficiently. If there was
20 bleed-over or things that you could address generally
21 as to all defendants, this would be the time to do
22 it. If you're comfortable waiting to take up the
23 specifics until we're closer to trial for Group 2, I
24 think that's fine. But that was the purpose in
25 prepping you the way that I did.

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1 THE COURT: Okay. Well, if then, nobody
2 has any objection to that, then we'll go ahead and
3 put the Group 2 motions in limine, your specific
4 motions in limine aside.

5 All right. Two people have come on the
6 phone. Who has come on the phone that hasn't entered
7 an appearance? And make sure that your mute button
8 is not on as you talk.

9 THE CLERK: Judge, I dropped off, and just
10 go back on the line.

11 THE COURT: Okay. All right. So I am
12 moving then, unless somebody has something better to
13 move to, to Document 1505, which is a joint motion by
14 the defendants to prohibit cooperating and other
15 witnesses from testifying to fear of defendants, the
16 SNM, or retaliation, and about any witness protection
17 measures.

18 Let me give some thoughts on this, and then
19 I'll hear what anybody wants to say on this. I'm
20 trying to think -- and the Government may be able to
21 think of some reason why they should, but I can't
22 think of any sort of independent reason that the
23 cooperating witnesses should take the stand and
24 testify about their fear of testifying against the
25 defendants. It seems to me that that has a number of

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1 issues and problems.

2 First of all, if the defendants -- I mean,
3 if the cooperating defendants are going to be
4 testifying that they're afraid of the defendants, it
5 seems to me that the jury may be sitting over there
6 thinking, Well, maybe I should be afraid, too. That
7 seems to me it doesn't help the defendants, because
8 if they are fearful of the defendants, they may feel
9 like, well, they better just not convict anybody for
10 fear of what might happen to them.

11 On the other hand, it could also work the
12 opposite against the defendants; that they better
13 convict all these guys so that they're not out to
14 hurt cooperating or themselves.

15 So I think it's a two-edged sword.

16 Everybody in the room can sort of evaluate that for
17 their own. But I'm trying to think of how there is
18 any probative value that is legitimate for them
19 testifying about just a general fear.

20 As far as SNM, it seems to me the
21 cooperating defendants can talk about SNM, if they
22 have personal knowledge of that. So it seems to me I
23 shouldn't be excluding just their discussion of SNM.
24 We'll just have to take those one at a time. They
25 have to be testifying from personal knowledge. But I

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1 would assume that many of the cooperating defendants
2 do have some relevant information and testimony about
3 SNM. So I'd be inclined to deny that as a blanket.

4 Also, it seems to me that they may know and
5 have personal knowledge of retaliation in specific
6 instances against witnesses and other people who
7 cooperate and snitch and those sort of things. And
8 so it would seem to me that I can't blanket knock
9 that evidence out of the case from cooperating
10 witnesses. So I'd be inclined to deny that.

11 And then, as far as any witness protection
12 measures, it seems to me that probably falls within
13 the same comments I had about cooperating witnesses
14 testifying about fear. On the other hand, it may be
15 that the defendants have some reason to bring that
16 up. And if they do, and they open the door because
17 it's part of any plea agreement or agreement that
18 that witness has with the Government, then they can't
19 open the door and then shut it for the Government.
20 So it's got to come in, but I think it's probably
21 going to be for the defendants' choice, rather than
22 the Government's choice as to whether they talk about
23 witness protection measures.

24 So those are my thoughts coming in about
25 how to deal with this. I think this was Mr. Villa's

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1 motion. Ms. Fox-Young, are you going to argue it?

2 MS. FOX-YOUNG: Sure, Your Honor.

3 THE COURT: How close did I get to

4 something you can live with?

5 MS. FOX-YOUNG: I think we can absolutely
6 live with the Court's proposed ruling. And we just
7 ask that the Court take up any specific threats --
8 and I don't think the Court can anticipate everything
9 that will come up from either side -- but just take
10 them as they come at trial.

11 But I think the Court's ruling in terms of
12 a blanket ruling and a general fear is exactly what
13 we were looking for.

14 THE COURT: Like Mr. Perez was testifying
15 in his testimony that he didn't want to get labeled a
16 snitch, and you know, thought that it was useful to
17 get information out there so people didn't do things
18 to him. I think it's just hard to probably blanket
19 exclude retaliations, because it seems to be part and
20 parcel of the story that's going to be told.

21 MS. FOX-YOUNG: I think the Court
22 understands what Mr. Villa was getting at in terms of
23 generalized fear. And we'll just have to take them
24 issue by issue at trial.

25 Thank you, Your Honor.

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1 THE COURT: Thank you, Ms. Fox-Young.

2 Anybody else? Everybody on the defense
3 side can live with kind of the line I propose? Let's
4 see what the Government says here in a moment. Mr.
5 Castle, do you want to comment on that?

6 Ms. Rodriguez, are you on the phone now?

7 MS. RODRIGUEZ: I am, Your Honor.

8 THE COURT: All right. Ms. Rodriguez, good
9 morning to you.

10 MR. RODRIGUEZ: Good morning, sir.

11 MR. CASTLE: Your Honor, the only comment I
12 have is that in the Government's response -- and I
13 think we're anticipating might happen at trial -- is
14 that one defendant might open the door to evidence of
15 fear. The concern I have that I want to raise -- I'm
16 not sure I'm asking for a ruling right now, but I'm
17 just lodging this concept with the Court -- is that,
18 just because one defendant might open the door to
19 something, the other defendants aren't necessarily
20 agreeing to that door being opened and the prejudice
21 that flows from that act being shared by everyone.
22 So I think we have to be real careful that a
23 particular defendant opens the door to fear evidence,
24 that it's got to be fear of that particular
25 defendant. Because, otherwise, all the defendants

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1 will be painted with a brush that they didn't hold in
2 their hand. So that's the concern I raise to the
3 Court, because I think there are different strategies
4 that different lawyers want to take. And one example
5 that I would give is one we talked about a little bit
6 yesterday, is monies that are given to a particular
7 witness. If there are expenses, one defense lawyer
8 might avoid that, saying, Well, that's witness
9 protection money. That was expenses necessary to
10 protect that witness. Another lawyer might decide,
11 Well, I'm going to go for it, and I'm going to go
12 ahead and put that evidence on. That shouldn't
13 prejudice the defendant that holds their cards close
14 to their vest and makes sure that their client
15 doesn't open the door to prejudicial information.

16 That's the problem with co-defendant cases.
17 But that's the way the Government has chosen to
18 indict this case. This isn't the way these
19 defendants chose to be tried. In fact, I think every
20 one of them has moved for a severance. So when we
21 get to that bridge that needs to be crossed, I just
22 raise that concept that we may need to tailor any
23 remedy that the Court orders to the circumstances at
24 hand.

25 THE COURT: Well, I hear what you're

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1 saying, and I am not -- I guess I'll indicate that I
2 guess I'm not -- I probably will not be quick to find
3 that the door has been opened, or it's been opened so
4 wide that we run a truck through what we're working
5 out here today.

6 But, at the same time, I think it may be
7 hard, once some defendant decides to put fear in the
8 courtroom, we don't generally sort of talk
9 specifically about defendants. We don't specifically
10 talk about cooperating witnesses. Sometimes it gets
11 generalized. And so I think what you're saying, and
12 I think I agree, we may just have to play it by ear
13 at that point. But I've got to be fair and sort of
14 think about what's going on. I mean, if one
15 defendant is over there jumping up and down talking
16 about fear, you know, I may not be able to do much
17 about it. It might be that I just have to sort of
18 say, Well, it's in the room, and we've got to deal
19 with it.

20 MR. CASTLE: I think, at that point in
21 time, we'll all make our records and move from there.

22 THE COURT: Fair enough.

23 Anyone else before I hear from the
24 Government? Everybody fairly comfortable with where
25 I'm proposing to draw the line on this issue? All

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1 right.

2 Mr. Castellano, are you going to be the
3 one? Mr. Beck? Can you live with what I'm banging
4 out on this motion?

5 MR. BECK: I can. And I think with regard
6 to Mr. Castle's comment, you know, if a defendant
7 chooses to cross-examine a witness about promises
8 made, and brings out that promise was made to
9 relocate the cooperating witness either before or
10 after trial or during trial, relocate the witness'
11 family, or anything like that, well, then, I mean, I
12 if think that opens the door to the Government
13 saying: Why is this happening. And I think, in that
14 case, if a defendant then wants to go and say, Well,
15 are you specifically afraid of my client, they're
16 able to do that on recross. So I think that's just
17 the way it will play out.

18 I mean, the Government doesn't intend to
19 bring out any generalized witness fears on direct
20 examination.

21 THE COURT: I think that what we're banging
22 out is -- puts an additional burden on you, as far as
23 your cooperating witness. I think you need to talk
24 to them about -- because Mr. Cordova was -- he's a
25 little bit of a live wire here. I mean, once he

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1 started talking, he was talking. So I think you're
2 going to have to talk to him a little bit about:
3 Don't bring that up on your own. If you get asked,
4 and you have to answer, then just be truthful, and do
5 what you got to do and say what you got to say. But
6 they probably shouldn't walk in here and drop, you
7 know, right off the top the bomb that they're afraid
8 to be here and they're scared of everybody in the
9 room. So talk to them about it before they take the
10 stand, so we don't inadvertently and unwillingly get
11 that issue dropped on us and we have to deal with it.

12 MR. BECK: We'll do that with all of these
13 pretrial rulings, Your Honor.

14 THE COURT: Anything else, Mr. Beck?

15 MR. BECK: No, Your Honor.

16 THE COURT: Anybody else on the defense
17 side? Ms. Fox-Young? Anybody else have anything on
18 that issue? All right. So we'll so proceed on
19 Document 1505.

20 Let's go to 1512. My -- refresh my memory
21 on this. I think it might have been labeled a little
22 bit different. This, again, I think is from you and
23 Mr. Villa, Ms. Fox-Young, but is this different than
24 your bad acts? Or is this a new motion, a new
25 version of what we dealt with earlier that -- well,

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1 let me just hear what you're trying to do here rather
2 than me trying to characterize it. It seems like we
3 might have sort of dealt with this in the past.

4 MS. FOX-YOUNG: Your Honor, I'm looking for
5 1512, if you just give me a moment.

6 THE COURT: This is the opposed motion to
7 exclude references to and evidence of unrelated
8 enterprise acts. That sounds to me a little bit like
9 the 404(b), which I think you have a separate 404(b)
10 motion.

11 MS. FOX-YOUNG: We do, Your Honor. I think
12 a number of defendants joined this motion, 1512. And
13 I think the Court maybe has already at least
14 partially ruled on this issue. But this motion --
15 and we may take this up with each 404(b) motion
16 individually -- but we're moving the Court to exclude
17 specifically enterprise acts from the second trial,
18 and certainly from the other cases, unless there is,
19 you know, a relevance finding.

20 I think the Court has construed the
21 racketeering enterprise, the RICO broadly. I don't
22 know if the Court wants to take another look at that
23 with respect to the individual bad acts. But that's
24 what we're asking for here. You know, for instance,
25 Mr. Castle and Mr. Cooper's client is in the trial

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119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

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1 with allegations dating back to the year 2000. We
2 don't think that those acts, those allegations,
3 should come in, you know, for the Government to prove
4 up the existence of the enterprise, when they have
5 nothing to do with Molina and the Marcantel counts.

6 THE COURT: So this just relates to the
7 second trial?

8 MS. FOX-YOUNG: The second trial, 1613, and
9 the other stand-alone cases as well.

10 THE COURT: But it doesn't apply to the
11 first trial?

12 MS. FOX-YOUNG: It applies -- what we're
13 asking is that none of these acts from the second
14 trial and the other indictments come in at the first
15 trial.

16 THE COURT: Okay. Well, my sense is I've
17 already ruled on that. I mean, I hit it again in Mr.
18 Sanchez' motion to sever yesterday. I plowed through
19 that. So I think I've looked at that several times.
20 I may be wrong, but --

21 MS. FOX-YOUNG: I think you have, Your
22 Honor. I read that, and we don't need to rehash it.

23 THE COURT: All right. Anybody else got
24 anything on this? Mr. Burke?

25 MR. BURKE: Your Honor, this may be a

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1 motion that we reraise before the Group 2 trial,
2 because we'll have to see what sorts of --

3 THE COURT: On the second trial?

4 MR. BURKE: Yes, Your Honor. All right.

5 Thank you.

6 THE COURT: But you were also, Ms.

7 Fox-Young, raising it at the first trial, keep the
8 evidence out on those counts out of the first trial,
9 right?

10 MS. FOX-YOUNG: Yes, Judge.

11 THE COURT: Anybody else want to say
12 anything on this? I don't mind relooking at it. But
13 I have looked at it several times, and keep coming to
14 the same conclusion.

15 Mr. Castellano? Mr. Beck. Anybody want to
16 say anything on this? Mr. Castellano? Do you think
17 I'm getting it right?

18 MR. CASTELLANO: I think you are, Your
19 Honor. We filed an omnibus response to the bad acts
20 motions, which is --

21 THE COURT: Yeah, I haven't gotten all the
22 briefing -- I've read it all, but I haven't gotten it
23 all linked up by paper clip.

24 MR. CASTELLANO: This Document 1581, I
25 don't think we have to go into it right now.

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1 THE COURT: What's the number on in?

2 MR. CASTELLANO: It's 1581. But what I'll
3 do is just highlight one of the cases, which is the
4 Diaz case from the Second Circuit. It's 176 F.3d 52.
5 And just to give the highlights, there is a
6 discussion in here about admission of bad act
7 evidence. And it says, "The Government introduced
8 evidence of prior uncharged crimes and other bad acts
9 that were committed by defendant appellants and
10 Government witnesses. And ultimately the district
11 court admitted this evidence, finding that it was
12 relevant because it tended to prove the existence,
13 organization, and nature of the RICO enterprise, and
14 a pattern of racketeering activity of each defendant
15 appellant."

16 THE COURT: And you would agree with me on
17 this statement I'm about to make as a general
18 principle for what we're looking at at trial, if
19 you're going to use this to establish enterprise or
20 furtherance of the enterprise's activities, you can't
21 just have a stand-alone bad act; you've got to link
22 it up in some way, and have evidence that it is not
23 just some individual's bad act, but it is part of
24 their efforts on behalf of the enterprise.

25 MR. CASTELLANO: I agree with that

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1 statement, Your Honor.

2 Also, on the same case, Diaz, there is a
3 discussion of spillover effect. And this was also a
4 motion to sever that was denied. And in that
5 discussion, one of the defendants noted that he was
6 implicated in only one of nine murders. He was tried
7 over three months before the same jury, who heard
8 volumes of evidence. Ultimately, the Court noted
9 that "the evidence in dispute is relevant to the
10 charges against all RICO defendants because it tended
11 to prove (1) the existence and nature of the Latin
12 Kings and their RICO enterprise; and (2) a pattern of
13 racketeering activity on the part of each RICO
14 defendant by providing the requisite relationship and
15 continuity of illegal activities." So here was a
16 situation where he was charged in only one of nine
17 murders, but as the Court also ruled recently in the
18 denial of the motion to sever, it comes in against
19 all defendants.

20 But you're right, we do have to link it up
21 to the enterprise. It can't be just some stand-alone
22 act that's a bad act.

23 THE COURT: And are you taking the same
24 position, and do you think you're correct on the
25 evidence that's coming in, you've been working on the

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1 James hearing with the co-conspirator statements?

2 MR. CASTELLANO: Yes, the same thing, Your
3 Honor.

4 THE COURT: So you prove one conspiracy
5 here, you've got another conspiracy over here, it
6 comes in against both of them because both
7 conspiracies are in furtherance of the enterprise and
8 its activities?

9 MR. CASTELLANO: That's correct.

10 THE COURT: And that's Smalls, right? So I
11 don't have to deal with a bunch of Bruton problems in
12 there because of the way Smalls from the Tenth
13 Circuit deals with that.

14 MR. CASTELLANO: That's correct. So we'll
15 have a number of things going on. I think we'll have
16 three categories. We're going to have co-conspirator
17 statements under James. Then we'll have statements
18 pursuant to Smalls, which will be statements against
19 interests which point a finger at other defendants.
20 And then, ultimately, there are Bruton statements out
21 there. I think that number will be small in this
22 case. I think, the only one I can think of right
23 now --

24 THE COURT: When you say "this case," are
25 you talking about the first trial or just the case

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1 overall?

2 MR. CASTELLANO: Overall. I think the Jose
3 Gomez assault is the one that has statements in there
4 that may be redacted. I can't think of any others
5 other than that particular incident.

6 But I think the Court has a right, and I
7 pointed out another case from the Second Circuit
8 which talks about that. There is also another
9 case -- and I can get it, Your Honor -- it's a Tenth
10 Circuit case, U.S. versus Harris; it's 695 F.3d 1125
11 from 2012. And this is a discussion that we've had
12 numerous times in court. And one of the issues in
13 the Harris case was that the overarching enterprise
14 was the Crips Gang, and there were three sets, or
15 subsets. So there were the Deuce Trey Crips, the
16 Insane Crips, and the Tre Five Seven Crips. But
17 ultimately, they were three groups who had come
18 together at various times. And ultimately, the Court
19 held that the three Crips sets together constituted
20 an association-in-fact enterprise. So I know there
21 has been discussion about the Old Timers and the
22 Dropouts, and the All Stars. But ultimately, our
23 facts in this case are stronger than the facts in
24 Harris. So, ultimately, this will come in against
25 the entire enterprise. And that's the Harris case,

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1 Tenth Circuit.

2 THE COURT: Anything else, Mr. Castellano?

3 MR. CASTELLANO: No, Your Honor.

4 THE COURT: Ms. Fox-Young, any further
5 comments on it?

6 MS. FOX-YOUNG: Just one brief comment,
7 Your Honor. I think the cases, Diaz and Harris, and
8 some of the other cases that the Government cites are
9 not cases where there was a severance. I think the
10 Court still does need to do 403 analysis. It may be
11 a little bit hard to do in the abstract. But with
12 respect to very old, very dated acts coming in in the
13 first trial, if the Government can't tie them up and
14 connect them, I think the analysis is different where
15 Your Honor has granted a severance. And I understand
16 the basis for the severance was not necessarily that
17 the Court's concerned about prejudice. But that
18 there may be instances where that 403 analysis yields
19 a different result. And I just would ask the Court
20 to keep that in mind.

21 THE COURT: I'm always worried about
22 prejudice.

23 MS. FOX-YOUNG: Thank you, Judge.

24 THE COURT: Never leaves my mind.

25 Thank you, Ms. Fox-Young.

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1 Anybody else want to comment on this
2 motion? All right. So that motion is pretty much
3 denied. I may take another look at some of these
4 cases, but I think we've plowed that ground pretty
5 hard.

6 All right. Let's go to the moniker, alias
7 names. Let me use Mr. Acee a little bit as an
8 example here, and see if I can separate out maybe
9 some of the problems. If the case agent is on the
10 stand, and he's talking about alias names and
11 monikers, I guess I do that with some caution,
12 because it seems to me he may have gotten that
13 information solely from other people and not having
14 personal knowledge.

15 On the other hand, if a cooperating witness
16 is on the stand talking about monikers, talking about
17 aliases, those sort of things, and that's just what
18 he calls -- and he can say I called him "Pup" Baca.
19 He calls him that, it seems to me I shouldn't
20 probably be excluding that. So I guess what I would
21 suggest is that -- I guess my proposal would be that
22 Mr. Acee and other people that may be, like him,
23 testifying as case agents, or something, not use
24 alias names, not use monikers, those may be somewhat
25 argumentative, and may not have personal knowledge of

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1 them, other than what he's been told, there not be
2 restriction on cooperating witnesses and people that
3 have personal knowledge. They can use whatever names
4 they use. As we saw from the testimony last week, I
5 think it was Mr. Perez and Mr. Cordova both at times
6 didn't know their real names. They only knew them
7 through monikers and aliases. So it seems to me I
8 shouldn't restrict it there.

9 In closings, it would seem to me that the
10 Government is free to use whatever it wants to, in
11 arguments. It should not use those in probably
12 opening statements. But that's, I guess, where I was
13 inclined to draw the line here.

14 Hold on. Let me see if there was something
15 else I wanted to say as an opening statement. Well,
16 I think that's it as far as some opening remarks.

17 Ms. Harbour-Valdez, Mr. Burke, I think this
18 was your motion. Do you think you could live with
19 where I'm drawing the line?

20 MS. HARBOUR-VALDEZ: Yes, Your Honor, we
21 could live with that compromise.

22 THE COURT: All right. Anything else you
23 want to say on the motion?

24 MS. HARBOUR-VALDEZ: Nothing else. Thank
25 you.

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1 THE COURT: Any of the defendants want to
2 comment on this, either for or against where I'm
3 drawing the line?

4 All right. Ms. Armijo, what's the
5 Government think about this?

6 MS. ARMIJO: Your Honor, in general, we
7 would agree. The only distinction I could think of
8 is that if we have STIU officers come in here who
9 have dealt, for instance, with Mr. Baca for years,
10 and if they call him "Pup" -- on a personal basis.

11 THE COURT: If they're able to say, I call
12 Mr. Baca "Pup," and he responds to me, and he answers
13 to "Pup," I think that's personal knowledge.

14 MS. ARMIJO: Okay. Thank you.

15 THE COURT: But I think you might have to
16 establish that, rather than -- you know, so the jury
17 doesn't get the sense that this person was just
18 trained or coached for this trial to call him "Pup"
19 for some strategic reason. But I think if they say,
20 At the jail I call him "Pup," he responds to me. I
21 think that's personal knowledge.

22 MS. ARMIJO: Thank you.

23 THE COURT: Can you live with that?

24 MS. ARMIJO: Oh, what about business
25 records? Mr. Beck brought up a good point.

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1 THE COURT: Well, I don't think -- if
2 something is coming in in a document, and it has
3 their names, I don't think we're going to be
4 sanitizing business records. So, for example, I
5 guess -- I don't know, I'm not sure what business
6 record we're maybe talking about; it wouldn't be --
7 302s wouldn't be business records, but what business
8 records are we talking about? What are we trying to
9 get in under business records?

10 MR. BECK: I'm thinking about STIU files.
11 If there is -- you know, I mean, I can't give an
12 example, but if there is like a jail business record
13 that would list their moniker on the top, and that's
14 how the jail keeps the name of them, or if we talk
15 about, you know, previous pleadings and cases where
16 there may be an a/k/a or something like that. I
17 mean, I can't think of a specific example. But I can
18 think of documents that we may be entering, or the
19 defendants themselves may be entering as business
20 records, and the way in which they were made and
21 preserved at the time, may refer to these folks'
22 monikers. And so I don't think that we would be, you
23 know, sort of redacting on the fly going through all
24 these documents to redact monikers.

25 THE COURT: All right. I don't think the

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1 motion is trying to sanitize documents.
2 Ms. Harbour-Valdez is shaking her head no. Without
3 ruling on whether anything is coming in, I mean, I'm
4 not trying to say business records are coming in.
5 But assuming they do, I don't think anybody is
6 sanitizing.

7 Anything else, Mr. Beck? Ms. Armijo?

8 MS. ARMIJO: No, Your Honor.

9 THE COURT: All right. Anybody else? Just
10 a few sort of modifications there, everybody can live
11 with that? Mr. Castle?

12 MR. CASTLE: Yes, I'm looking for a
13 microphone. Your Honor, I know the Court's not
14 making any ruling on hearsay objections. But this
15 concept of business records exception has been
16 bandied about in numerous hearings concerning reports
17 of these investigative agencies. That's dealt with
18 not as a business record but as a public record under
19 803(8). And what 803(8) says is that, "Matters
20 observed while under a legal duty to report, but not
21 including in a criminal case a matter observed by law
22 enforcement personnel." So the rules of evidence,
23 explicitly in criminal cases, indicated that law
24 enforcement reports are not admissible against a
25 criminal defendant. And the reason for that, as we

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1 can all imagine, is you can try the case with just
2 the reports of the officers. Just because they're
3 kept by the police department, that doesn't immunize
4 them from the rules of evidence.

5 So it's been indicated time and time
6 again -- let's talk about business records, but
7 they're actually analyzing it under the wrong
8 subsection of 803. It has to be analyzed under
9 803(8), which specifically says that those kinds of
10 reports by law enforcement personnel, if they are in
11 a criminal matter, are not allowed. And specifically
12 803(8)(a)(iii) says it's admissible against the
13 Government in a criminal case, factual findings from
14 a legally authorized investigation. It's not
15 admissible for the Government in a criminal case.

16 And so I just bring that up because it's
17 going to be argued over and over again, I know the
18 Court is probably thinking about these issues. The
19 rules of evidence specifically prohibit the kinds of
20 arguments -- well, not the arguments, but the
21 admission of materials that are suggested by the
22 Government here.

23 THE COURT: All right. I guess, without
24 giving a complete agreement with Mr. Castle, I'm
25 cautious about business records, when it's the

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1 Government offering them, and tend to kick into those
2 other hearsay exceptions that deal with Government
3 records, public records, and those sort of things.
4 So I've written a fair amount on these evidentiary
5 issues, both business records -- a lot of times what
6 people call business records don't really come within
7 the business records exception. And so I do think I
8 have to be cautious about that.

9 Mr. Beck?

10 MR. BECK: I had in mind more of the
11 placement records. I'm aware that law enforcement
12 reports are public records. So I wasn't thinking of
13 those. I mean, I understand the law in this area. I
14 don't want to --

15 THE COURT: All right. I've written on
16 both of these, both I think it's 508 and 506. So I
17 think I've got opinions out there. You might want to
18 take a look at them. And what we might do is, you
19 know, the defendants might pick one document, the
20 Government might pick one document, or a handful of
21 documents, give them to me pretrial. Let me take
22 look at them. If I can sort of give you some
23 categorical rulings or some rulings on particular
24 documents, whether they're in or out, it might give
25 you some guidance. I'll be glad to take a handful

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1 from each side and see if I can give you some
2 guidance.

3 All right. We will then put aside the
4 moniker issue. I think we have an understanding how
5 we're going to deal with that.

6 Let's go to 1514. This is Ms. Fox-Young's
7 motion in limine to exclude statement of cooperating
8 Government witnesses.

9 MS. FOX-YOUNG: Your Honor, I know the
10 Court has thought about the order you want to hear
11 everything in. It might make sense to take this up
12 after we do James, only because I don't know what
13 you'll have left.

14 THE COURT: Okay. All right. I was
15 wondering if that was tied to the James hearing. So
16 I'll put 1514 back in the mix.

17 All right. Let's take then up 1515, which
18 is invocation of the rule. I didn't get tied the
19 Government's response. But from memory, I recall
20 that there was an objection to this. So the
21 defendants are requesting that the Court order the
22 witnesses be excluded from the room for all future
23 evidentiary hearings and any trial in this matter.

24 What I would propose to do is, we take the
25 evidentiary hearings one by one. It may not be that

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1 we need a blanket exclusion for all witnesses, but if
2 everybody wants to do it now, we can. But certainly
3 at the trial, witnesses are excluded from the trial.
4 They cannot speak to each other about their
5 testimony. They can't discuss their testimony with
6 each other, although they can talk to attorneys about
7 their testimony. I think there is an agreement -- it
8 looks like Mr. Acee is going to be the case agent, so
9 he can remain in the courtroom. Experts can remain
10 in the courtroom.

11 What else on the rule do the defendants
12 want or need?

13 MR. BENJAMIN: I think that's it, Your
14 Honor.

15 THE COURT: Covered it. All right. How
16 about Ms. Fox-Young? It's your -- Mr. Perez' motion.
17 Anything else you can think of I need to rule on?

18 MS. FOX-YOUNG: Nothing else at this time,
19 Your Honor.

20 THE COURT: All right. Do y'all -- let me
21 ask this: Do we want to invoke the rule for all
22 further evidentiary hearings before trial? So, in
23 other words, witnesses who are going to testify in
24 any evidentiary hearings or in trial will be required
25 and expected to remain outside the courtroom?

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1 MS. FOX-YOUNG: Yes, Judge.

2 THE COURT: Is the Government okay with
3 that?

4 MR. CASTELLANO: That's fine, Your Honor.

5 THE COURT: Okay. All right. So from this
6 day forth, if we have evidentiary hearings, all
7 witnesses will remain outside of the courtroom.

8 Anybody else? Any other defendants want to
9 comment on this?

10 Mr. Castellano? Is how I'm drawing the
11 rule, is the Government comfortable with that?

12 MR. CASTELLANO: Yes, Your Honor.

13 May I have one moment, please?

14 THE COURT: Certainly.

15 MR. CASTELLANO: Your Honor, we don't have
16 any objection to that. I will note that on one
17 occasion with defense counsel's permission another
18 agent sat in so she could hear the testimony of one
19 of the experts. That was related to the ELSUR
20 devices. But we got permission from the defense
21 first. So I think, if we have a request, we can put
22 that to the defense and take care of it that way.

23 And we filed a response to this motion, as
24 well to, I think, maybe Ms. Sirignano's, which was
25 the reading of transcripts during trial as well. And

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1 we had no objection to that. We thought the case
2 agent could do it, the experts could do it. And if
3 we had some reason why we thought someone else should
4 do it, we would request that of the Court and counsel
5 beforehand. I don't remember the number of her
6 motion, but we responded to a few motions. Possibly
7 1518, I think is the other motion.

8 MS. SIRIGNANO: It's 1518.

9 MR. CASTELLANO: So we can dispose of those
10 both at one time if the Court wanted to.

11 THE COURT: Okay. Everybody in agreement
12 on that? So I understand on transcripts experts can
13 look at transcripts; that's what we talked about
14 yesterday. But no fact witnesses will review
15 transcripts. That will be part and parcel of the
16 rule. All right. Not hearing any objection, that
17 will be incorporated.

18 All right. Anything else on those two
19 motions? Do you have anything else, Ms. Sirignano?

20 MS. SIRIGNANO: Yes, Your Honor.

21 THE COURT: Let me ask Mr. Castellano, I'm
22 looking -- I know I read your response, Mr.
23 Castellano, but do you have the number on it?

24 MR. CASTELLANO: I think it's 1571, Your
25 Honor. You probably missed it because it was so

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1 short.

2 THE COURT: Well, I'm just not seeing it.

3 But that's not a problem. Go ahead, Ms. Sirignano.

4 MS. SIRIGNANO: Thank you, Judge.

5 I just wanted to clarify and make sure that
6 your ruling is for both trial and pretrial testimony
7 transcripts. You might have said that, but I might
8 have missed it.

9 THE COURT: Is that agreeable to the
10 Government, that the transcript rule will go into
11 effect now, so fact witnesses shouldn't be reading
12 evidentiary or trial transcripts, and they certainly
13 shouldn't in trial. Experts can do that?

14 MR. CASTELLANO: Yes, Your Honor. Well,
15 I'm not even sure I'd call it an exception. I think
16 the witnesses can read their own prior testimony.
17 But I don't think that's covered by the rule. It's
18 their own testimony. That would be the only caveat.

19 THE COURT: All right. Is that agreeable,
20 Ms. Sirignano?

21 MS. SIRIGNANO: Yes.

22 THE COURT: People can read their own
23 testimony, but they can't read testimony of other
24 fact witnesses or experts, and experts can read any
25 transcript.

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1 MS. SIRIGNANO: Thank you, Your Honor.

2 THE COURT: All right. Anything else on
3 the rule or transcripts?

4 Let's go to 1516, which is the presumption
5 of innocence. Is Mick available? Is he here today?

6 THE MARSHAL: Yes, sir, he is.

7 THE COURT: Would you mind asking him to
8 come up? He just might want to listen to the
9 conversation we're going to have on this. I think I
10 need to have marshals listening to this. And then
11 they're going to have to participate in whatever we
12 work out.

13 THE MARSHAL: Yes, sir.

14 THE COURT: Why don't we hold up on this
15 516 till Mick gets up here.

16 All right. Number 518 (sic) was the one
17 that Ms. Sirignano rolled in to the discussion of the
18 reading of the trial transcripts.

19 MS. SIRIGNANO: Your Honor, that's 1518.

20 THE COURT: Yeah. And that's where the
21 Government's response was, wasn't it? 1571.

22 All right. Shall we go to 1519? This is
23 Daniel Sanchez' motion in limine to prohibit
24 Government from making statements or argument that
25 improperly suggests that propensity character

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1 inferences can or should be made from extrinsic act
2 evidence.

3 I guess how I would draw the line is on
4 either res gestae, or what I'm going to call
5 enterprise or furtherance of the enterprise evidence,
6 it seems to me that the Government should be
7 prohibited from saying because they were involved in
8 this murder, they were involved in the Molina murder,
9 for example.

10 You are free to argue that because they
11 committed that murder in furtherance, that that shows
12 that there was an enterprise, and that they did that
13 in furtherance. But you still can't argue
14 propensity. If I determine on the 404(b) that
15 certain, what I'm going to call 404(b) evidence -- I
16 know that's a little bit of a misnaming of that
17 category, but I think we know what, as trial lawyers
18 and judges, what we're talking about -- if it comes
19 in as 404(b), then you do get to argue that it's
20 coming in to show intent or pattern, or whatever I'm
21 letting it in for. But you can't argue that because
22 they did it in the past, they must have done it this
23 time. And so probably true propensity evidence, the
24 Government can't make the argument and shouldn't make
25 the argument. I'm trying to think of any situation

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1 in which it would be proper for the Government to
2 make in this trial a true propensity argument that
3 because they did it in the past, they do it -- they
4 did it here.

5 I can't find my -- I'm looking for 1519.
6 All right. What is -- I think this was a motion that
7 Ms. Jacks filed, Mr. Jewkes filed. Can you live with
8 where I'm -- well, I guess I'm pretty much agreeing
9 with you here. It seems to me that the Government
10 cannot argue and should not argue from any evidence
11 in this case, make a propensity argument. That's
12 your point; am I correct?

13 MS. JACKS: Yes.

14 THE COURT: Oh, there is Ms. Jacks. I
15 didn't see you there. Sorry.

16 All right. Any of the defendants have any
17 arguments?

18 Mr. Mickendrow, let me finish up this
19 motion. I'll come back to the one that you might
20 want to listen in on the arguments we're about to
21 have.

22 Anybody else on the propensity argument?

23 Mr. Castellano, are you handling this one? Do you
24 agree with me that probably the Government is not
25 permitted to draw propensity inference, ask the jury

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1 to draw one, make an argument from any evidence
2 that's going to get into the trial?

3 MR. CASTELLANO: Yes, Your Honor, I think
4 that only makes sense. I don't think we can say just
5 because it happened on day one, it also happened on
6 day two, we have to tie those things together. You
7 touched on it a little bit in your severance
8 memorandum yesterday, indicating that if an order was
9 issued, there would be repercussions for not
10 following that order. But that would be tying up the
11 evidence, as opposed to just saying one thing
12 happened, and then you must believe the other thing
13 happened. So I agree with the Court.

14 THE COURT: Okay. And the defendants may
15 be entitled to a limiting instruction. There is a
16 pattern jury instruction on the 404(b). A little
17 trial I had just two weeks ago with Bob Gorence, he
18 wanted it; got a split decision. He didn't get an
19 acquittal on Count 1 on the conspiracy, but he got it
20 on Count 2, on the distribution.

21 So I understand sometimes defendants like
22 that 404(b) instruction, sometimes they don't. But I
23 think you're entitled to it. If you decide you want
24 the 404(b) instruction, and you want it at the time
25 the evidence is coming in, kind of put that burden on

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1 the defendant to tell me that they want it, because
2 sometimes they just want to let it slide through and
3 they don't want to highlight it. So I'm not going to
4 intrude into the trial. The Tenth Circuit says I
5 should give it at both times, at the time the
6 evidence comes in and at the final instructions. But
7 I try not to intrude. So I'm going to have to get my
8 cues from the defendants whether you want me to give
9 it or not. But I think you're entitled to it.

10 All right. Anything from anybody else on
11 the propensity evidence that Ms. Sanchez filed? All
12 right. That will be the ruling. The Government just
13 can't ask the jury to draw any inferences or make any
14 propensity arguments.

15 All right. Mr. Mickendrow, what I'm about
16 to do is I'm about to hear a motion that the
17 defendants have filed requesting what they call the
18 maintenance of the appearance of innocence. What
19 they're putting into this basket is going to be
20 things that are going to implicate the marshals, and
21 how they're going to try this case. I'm going to be
22 a judge up here, and I'm going to do the best I can
23 to be a judge and be fair to the parties in this
24 case. So I'm going to make some rulings, but they
25 are going to be tentative rules. You're going to get

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1 to listen, and hear why, from a lawyers' standpoint
2 and a judge standpoint, why we think this is what
3 this trial ought to look like. But I'm not going to
4 cram it down your throat. So don't panic. You're
5 part of the players in this trial, and I want to
6 respect what y'all have done for us all over the last
7 few months. And I want to work with you and be
8 cooperative going forward. So I wanted you to hear
9 this, but -- and I'm going to make some rulings, and
10 then probably we'll be then talking with you.

11 Ms. Wild will be talking with you. If need be, we
12 may have to pull Marshal Candelaria into the picture
13 or something like that. So don't panic. I'm going
14 to do my judge thing. I'm trying to be fair here,
15 and try to work out some things. And if they don't
16 work for you, then we'll put them back on the table.
17 Does that sound okay to you?

18 MR. MICKENDROW: Sounds good, Judge.

19 THE COURT: All right. But I thought it
20 made sense for you to hear this.

21 All right. Let's talk about the shackles.
22 Here's what my thoughts are on the shackles. It
23 seems to me -- let me do some counting here. How
24 many people do we have? We're probably going to --
25 tell me -- I would imagine we're going to switch

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1 tables here for this trial. So they will be coming
2 out these doors. Isn't the jury room over here?

3 This is the jury room?

4 THE CLERK: Yes.

5 THE COURT: So probably we'll be switching
6 tables. So unlike in Albuquerque where -- well, no,
7 that's what I do in Albuquerque. The defendants sit
8 over here, and the prosecution sits over here, we'll
9 probably switch. So the big table will be over here.
10 And if necessary, there may have to be a bigger
11 table. We may have to do a little bit of putting the
12 tables together. But how many men and women do we
13 have around this table here? Can somebody count for
14 me?

15 MR. BENJAMIN: Eleven, Your Honor.

16 THE COURT: Eleven. So we've got the five
17 defendants; give them a lawyer apiece, and y'all have
18 got more than two. So I'm probably going to need a
19 bigger table. So it's probably going to be over
20 here. What I'm going to suggest is that the --
21 they're all men for the first trial, so all the men
22 are going to be -- remain shackled at the feet. They
23 will not have anything on their hands. And I'll use
24 bunting on both tables, so both the Government and
25 the defense table will have bunting on it. So, men,

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1 don't kick the bunting out of the way so they can see
2 your shackles. Don't do that. That's not going to
3 help anything. So watch it. I guess we'll have to
4 figure out how we're going to organize it so the
5 lawyers can be next to the defendants. But I imagine
6 we can figure that out. So that's what I'm thinking
7 about the shackles.

8 The transport -- if I understand the big
9 issue -- I was in the Albuquerque courthouse when
10 Judge Molzen arraigned many of the defendants here.
11 And it was quite a sight. I mean, there was more
12 high-powered rifles and ski masks and things like
13 that than I'm normally used to, coming in in the
14 morning. Given that we're going to be with five
15 defendants, I'm going to be asking that the marshals
16 bring in the transport people as inconspicuously as
17 possible, as they would bring in any other
18 defendants; they bring in the SNM defendants the same
19 way, try to get them into the building without any
20 sort of fanfare outside of the courtroom so that
21 neither prospective jurors nor the jurors that are
22 actually selected and are coming into the building
23 each day really notice the transport vehicles, and
24 they slide in and out of the building without any
25 sort of ski masks or any sort of -- maybe men outside

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1 with large guns, things like that, when the jurors
2 either are going to be here on the day that they're
3 selected or throughout the trial, so the jurors don't
4 see or get any sense from that.

5 Seems like there was one other thing. Can
6 somebody remind me what the vests were that said SOG,
7 what those --

8 MR. BENJAMIN: Yes, Your Honor. That's --
9 I think that's Special Operations Group, Your Honor,
10 and that would get me started on a whole pet peeve
11 from my time in the military for individuals that are
12 wearing that.

13 But the case in point would be sitting in
14 the jury pews right now. And that's kind of been a
15 morphing attire. There was individuals in here one
16 day with a whole bunch of zip ties, and everything
17 else. And so the attire has morphed.

18 And that takes us into the third point,
19 which is, as I styled it, "Gentleperson attire." I
20 would assume -- and has been the case in every
21 trial -- that the security shows up and is wearing
22 suits, and looks just like counsel. But I raise that
23 simply because of the way that this has morphed. One
24 of the things that happened, I think it was the first
25 day in Las Cruces, Your Honor. There was ski masks

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1 that kept coming on and off by the guards. So I
2 think it's something I need to raise.

3 THE COURT: Well, I guess what I'm thinking
4 of -- will be with the ski masks, if there are guards
5 who are afraid to be in this case and feel like they
6 need to wear ski masks, since we're reducing it down
7 to five defendants for the trial, could the marshals
8 work with the transport, the Corrections Department,
9 and maybe those men, women not be used, so I don't
10 have to have ski masks on or off at any time in the
11 courtroom?

12 As far as the men who have had heavy
13 attire, I guess I would -- you know, I don't have any
14 problem with it for the hearing that we had last
15 week. But I'm wondering if we need those for the
16 trial. So I will probably be talking to the marshals
17 about either, A, those people not be in the
18 courtroom. If they tell me they absolutely have to
19 be in the courtroom, I'll probably want them back as
20 they are now, rather than anywhere up here at the
21 front.

22 All right. Mr. Benjamin, those were going
23 to be my proposals of how we deal with -- and there
24 may be others, but what you're calling the
25 maintenance of the appearance of innocence. So what

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1 I've outlined, does that sound doable? Are there
2 other issues we need to address?

3 MR. BENJAMIN: I think that sounds very
4 doable, Your Honor. I just have two questions that I
5 would like to address the Court with. I guess the
6 first is, I understand the Court is going to discuss
7 this with the marshals, but assuming that the
8 marshals suggest that there need to be individuals in
9 the back of the courtroom, or one of the security
10 precautions, I guess the only request, the only thing
11 that's coming to mind is, if there was a way to be
12 included in that discussion after we get to that
13 point, so that we can try and raise some issues and
14 resolve some issues before a final ruling is made?

15 THE COURT: Well, I guess -- let Ms. Wild
16 sort of talk to the marshals. I don't really want
17 to -- unless I have to -- to be probably in
18 face-to-face discussions. If I need to, I will
19 probably do that. Probably we don't need it to be an
20 adversarial process, and that the Government there
21 and you there. Let's just see if I can get some
22 feedback here, and if there is issues, we'll be
23 discussing it with you.

24 MR. BENJAMIN: Thank you, Your Honor.

25 THE COURT: Does that sound okay?

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1 MR. BENJAMIN: Yes, Your Honor. I guess
2 I'd like to be included.

3 THE COURT: Well, I just want the marshals
4 to be able to speak very candidly to particularly
5 Ms. Wild. And you know, you start getting a lot of
6 counsel around, they may not say everything in front
7 of the defendants. And I just don't want to put them
8 in that position. But I'll try to be very fair and
9 make sure that nobody is surprised when we show up on
10 the first day of trial, or throughout the trial.
11 I'll try to keep that at a minimum.

12 MR. BENJAMIN: The second issue I'd like to
13 address, Your Honor -- and I understand the Court's
14 ruling regarding the bunting and the shackles. I'd
15 like the Court to consider whether there is an
16 alternative way of doing that, simply because of one
17 of my concerns is, I'm just looking at this table for
18 specifically trial Group 2, even if we expand this
19 table in some way, shape, or form, I don't think
20 we're all going to fit on that side, Your Honor. I
21 think we're going to have to be on both sides. Which
22 individuals on this side aren't going to be able to
23 probably realistically keep their feet under the
24 bunting. So I'm curious if there is not some kind of
25 ankle device or something else that could be used in

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1 lieu of shackles?

2 THE COURT: Well, I appreciate you bringing
3 that up. Mr. Mickendrow is taking notes back there.
4 And we'll see. It may be -- and I don't know this to
5 be the case, it may be that the marshals would feel
6 comfortable with certain men not having shackles on,
7 we can seat them on this side of the table, with
8 their attorneys, and other people on the other side
9 are going to need shackles, we can seat them on the
10 other. It may not be across the board the same. But
11 I appreciate you bringing alternatives up.

12 MR. BENJAMIN: I appreciate that, Your
13 Honor. And I guess that's it on that, I think.

14 THE COURT: Anything else? All right.
15 Thank you, Mr. Benjamin.

16 Anybody -- let me have Mr. Adams first,
17 then I'll have you, Mr. Jewkes.

18 Mr. Adams.

19 MR. ADAMS: Thank you. May I borrow your
20 microphone?

21 Judge, I would point out along the lines of
22 Mr. Benjamin's last points, I've got two things to
23 raise. But with shackles it's not -- so, first of
24 all, I do think there needs to be an individual
25 assessment done by the marshals. If there is a

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1 reason, and that's one of the reasons we've been
2 pushing to get out of the black boxes, so we can show
3 that there is no reason to shackle anybody. The goal
4 has to be that the jurors don't know if the
5 defendants are in custody or not. That's what we're
6 supposed to do.

7 At least, in South Carolina, if there was
8 that sound of a shackle, that's automatic mistrial.
9 It would be reversible error to go forward, if there
10 is any suggestion at all to the jurors that somebody
11 was in custody. I've done a lot of cases involving a
12 lot of murders, and they're always ways other than
13 shackles in state courts all over. And if the state
14 courts can afford it, I'm sure the marshals can
15 afford it. Whether those have been interlocking knee
16 devices, or in some instances, over our objections,
17 stun devices, or whatever, but ways that don't make
18 noise when people walk in and out of the courtroom.
19 Otherwise, we're going to be in a situation where at
20 every break the jurors have to get to their room,
21 white noise has to be turned on before anybody can
22 even get up to go to the bathroom.

23 So I think the shackles -- we're opposed to
24 Mr. Garcia being in shackles, because I think, as
25 much as you try to not let the jurors know, it's

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1 inevitable that they're going to hear the rustling of
2 chains. At that moment, we'll be moving -- we'll be
3 peppering the record with our objections. So I don't
4 think there is a showing that's been made as to why
5 Mr. Garcia would need to be chained. I think we need
6 him to act in a natural way with his lawyers. And
7 we're opposed to any shackling.

8 The other observation I'll make, and this
9 is for the marshals to consider. They obviously have
10 an important job related to security, and I'm aware
11 of that. I was leaving the courthouse last week, I
12 believe; it could have been two weeks ago, but I was
13 leaving 10 minutes after court, and I was driving
14 north of town back to the restaurant or hotel or
15 wherever I was going. And I had to get over onto the
16 shoulder of the road to get out of the way of a
17 caravan, about five vehicles, like two or three vans,
18 and then escort cars with sirens rolling. It could
19 have only been one thing, and that would be this
20 group of guys being returned to their facility. So
21 we're going to have to be mindful that jurors have to
22 come and go without being alarmed. And they have to
23 be able to go home, and there has to be a mechanism
24 where, if they see a whole bunch of cars with sirens
25 forcing them off the road on the way, which gives a

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1 signal that these people are really dangerous, watch
2 out, that they have to have the opportunity to come
3 tell the Court, and we just have to deal with it.
4 Obviously, if they need sirens to move people, they
5 need sirens. But maybe they need to wait, 30, 45
6 minutes after court breaks, so people can get on back
7 to wherever they're going and we don't -- jurors
8 don't encounter the same caravan. That's a pretty
9 frightening experience that I had, as I whipped over
10 on the shoulder.

11 Those are my two points.

12 THE COURT: Well, I've already talked to
13 Conrad Candelaria a little bit about leaving the
14 building. And it's been different in Las Cruces than
15 it was up north. And so he's thinking about that,
16 and he's aware of that issue. And we'll see how he
17 decides to work it out. And I'll put that on the
18 list of getting some response and get back to you.
19 But I was aware of that when I left the building as
20 well, and he's now aware of it. So we'll see how
21 that sorts out.

22 MR. ADAMS: Thank you.

23 THE COURT: But help me out. No drones or
24 anything. Nobody do any drones or advertise or
25 anything like that, and create any issues for me. So

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1 defense lawyers got to work with me, too. Don't do
2 anything unusual during the trial that's going to set
3 off any sort of alerts with the marshals that I have
4 to deal with. So, everybody, don't do those things,
5 okay?

6 MR. ADAMS: Judge, honestly, we'd like to
7 do just opposite. We'd like to take the first step
8 in getting these gentlemen out of the black boxes, so
9 they can show the Court that being caged up like this
10 is not necessary. And that's a very -- they'll still
11 be shackled and belly chained. That's a very small
12 step to show that they really can comply, so they can
13 earn their right to be treated fairly in front of the
14 jury.

15 THE COURT: It may be. But listen to what
16 I'm saying: Counsel, don't you do anything that's
17 going to create problems for the marshals. Don't do
18 any advertising, or you know -- I'm not saying don't
19 do advertising -- but don't do anything like drones
20 or anything like that that's going to create
21 additional problems and work for the marshals.

22 MR. ADAMS: Judge, if you are referring to
23 anything, I have no idea what you're --

24 THE COURT: You may not.

25 MR. ADAMS: I don't own a drone. We have

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1 one drone that I lost in the neighbor's tree. I
2 don't know what you're referencing to.

3 THE COURT: You may not, but people in this
4 room do. So help me out, work with me. Don't do
5 unusual stuff. Because when you do unusual stuff,
6 that makes the marshals nervous, that makes their job
7 harder, when people start doing unusual stuff. So I
8 think, if the defense counsel sort of do normal stuff
9 for this case, it decreases the number of sort of
10 incidents, and makes the marshals nervous, and then
11 we have to deal with additional problems.

12 All right. Anybody else? Mr. Jewkes.

13 MR. JEWKES: Your Honor, while we have
14 Mr. Mickendrow here, I'd like to bring up the issue
15 of courtroom attire for our client. I anticipate
16 that every one of these five will be wearing suits or
17 dress slacks and sports coats.

18 THE COURT: I would agree. So I will be --
19 that will be one of the things that I'll be
20 requesting of the marshals, is that they assist in
21 helping them dress in street attire, however you want
22 them dressed.

23 Now, y'all are going to have to work with
24 me. You're going to have to get clothes here
25 earlier, going to have to have them tried on well

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1 before the trial. So start thinking about that
2 earlier rather than the day of the trial.

3 MR. JEWKES: Your Honor, the reason I
4 wanted to bring this up in front of Mr. Mickendrow
5 is -- well, two reasons. First of all, leather
6 footwear. What's the marshal and the Court's
7 decision on that?

8 And secondly, once we bring the clothing
9 the first day, does that mean we have to bring it
10 every day, or is there a place here where it can be
11 kept where these guys can be dressed back there?

12 THE COURT: Okay. That's a fair question.
13 I don't know the answer for it. Mr. Mickendrow is
14 writing notes. Let me -- you just listen for a
15 little bit, Mr. Mickendrow. There is going to be
16 more people talking, and I'm not going to put you on
17 the spot today. You may have to think about this.
18 I'll make some rulings today, but they're with the
19 understanding they're tentative.

20 Let's see, Ms. Fox-Young, I think you were
21 next.

22 MS. FOX-YOUNG: Thank you, Your Honor.
23 Just along the lines of other security measures that
24 I think the jury should not be exposed to. And I
25 think if the marshals can work around the jury's

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1 timeline, the bomb sniffing dogs that are outside in
2 the morning when we come in, and that are in the
3 courtroom, I think, are something else that we've got
4 to work around.

5 THE COURT: Okay. Well, yeah, we'll see
6 what they want to do and what they need do. You
7 know, this is a federal courthouse, after Oklahoma
8 City, I don't know if anybody gets too worked up
9 about dogs being around. But we'll see what they
10 want to do. I think people expect, when they come
11 into a federal courthouse there to be certain
12 securities after Oklahoma City. So certain things
13 may be a little bit less suspicious to jurors.

14 Anyone else? Mr. Lowry. Let me let Mr.
15 Lowry, then I'll come back to you, Ms. Sirignano.

16 MR. LOWRY: Your Honor, I just wanted to
17 follow up and on a point Mr. Adams made, and I
18 understand the Court's concerns. But I can speak for
19 our counsel table, we've always had what I consider
20 to be an excellent working relationship with the U.S.
21 Marshals, and I appreciate the security that they
22 bring to the courtroom. But I think it would be
23 really helpful for all involved, if the Court could
24 give us, you know, a game plan. And I agree with Mr.
25 Adams, it would be really nice if we could get out of

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1 black boxes before the trial, if nothing else, to
2 practice in the courtroom. But if everybody is on
3 the same playbook of how you can earn the right to
4 get out of the black boxes between now and the
5 beginning of trial, it would just be helpful to get
6 everybody on their best behavior, Your Honor.

7 THE COURT: Thank you, Mr. Lowry.

8 Ms. Arellanes?

9 MS. ARELLANES: Judge, the only thing is,
10 that it may be premature, but there are a couple of
11 females, not in this trial. So I'm not quite sure
12 how the Court wishes to configure, arrange the
13 females around the defense table. Maybe we can
14 address that at a later point.

15 THE COURT: Well, I guess at the second
16 trial, I'm thinking that there -- I'll be probably
17 putting -- leaning on the marshals to let me just
18 treat them like any other defendant. They just go
19 around the table like everybody else. Is that kind
20 of what you're wanting?

21 MS. ARELLANES: I think, so Judge, yes.

22 THE COURT: So that's going to be a much
23 more logistical issue in the second trial, because
24 we're almost doubling the number of defendants that's
25 going to be in the courtroom. But we're going to

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1 have to do some reconfiguring of this courtroom to
2 try nine people sitting at that table.

3 MS. ARELLANES: Okay. Thank you, Judge.

4 THE COURT: At least one is out of custody,
5 so I can put one person on one side of the table
6 without having her in any sort of shackles or
7 anything.

8 Anybody else got anything on the wish list
9 they want Mr. Mickendrow to hear, Ms. Wild to hear,
10 the Government to hear, the Court to hear?

11 MR. BENJAMIN: Yes, Your Honor. One final
12 issue.

13 THE COURT: Mr. Benjamin.

14 MR. BENJAMIN: And I think this probably
15 deals with Count 1, but specifically with Count 2,
16 Your Honor, part of when we sit places in trial, we
17 usually choose those places. So I guess before
18 seating arrangements are done, if we could have some
19 input on that as well, where we're sitting.

20 THE COURT: Well, you can say. I'll tell
21 you that's not going to be my biggest concern.
22 You're probably going to get a seating chart.

23 MR. BENJAMIN: I understand, Your Honor.

24 THE COURT: If you want to express it to,
25 Ms. Wild, go right ahead.

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1 MR. BENJAMIN: The Court made a call for
2 any requests.

3 THE COURT: There you go. I did. I'm not
4 shutting you down. I'm just trying to give you quick
5 and dirty rulings.

6 All right. Anybody else? And I don't mean
7 to shut anybody down. I tried cases. And I used to
8 think it was important -- I used to have Ms. Wild
9 head over and stake out my table as soon as the
10 courthouse was open. So I know how important it is

11 All right. Ms. Armijo, Mr. Castellano, do
12 y'all want to --

13 MS. ARMIJO: Your Honor, one of the things
14 that we would ask -- and we'll work with the U.S.
15 Marshals on certainly -- is I know that, in looking
16 at the witness list, we're going to have double
17 digits of cooperators testifying. Some are in
18 custody with the U.S. Marshals, some are in custody
19 with Corrections. There is at least one person that
20 I know we'll have testify that is out of custody.
21 And so -- and this is just for the first trial alone.
22 So I think that there may be issues with -- and we'll
23 have to deal with this -- as far as how they're
24 coming into the courtroom. Because they're not going
25 to be coming into the courtroom necessarily -- when

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1 we had Mr. Cordova here last week, we took great
2 precautions of how we brought him in, how he came
3 into the courtroom and other things. So I think that
4 that's going to be another consideration.

5 THE COURT: Yeah, it's going to be a
6 consideration, because I understand I'm going to be
7 trying it in this room. And that's the jury room.
8 So you can't come in through the jury room like you
9 brought -- I assume that's how he got here. He was
10 all of a sudden standing right next to me, so I
11 assume that's how he got here. So, yeah, I mean, I
12 guess for better or worse, your cooperating witnesses
13 are going to have to come in through that back door.

14 MS. ARMIJO: So then the defense is going
15 to object to if -- you know, they're shackled or not.
16 I mean, is that going to be a concern of the defense?
17 So that's another issue to raise.

18 THE COURT: Well, let me say this: I
19 guess, unless the defendants tell me otherwise, it
20 wouldn't seem to me that it makes any difference to
21 you how the cooperating witnesses come into the
22 courtroom. If they look all shackled and everything,
23 then it seems like that's the image you're probably
24 going to want to paint of those people; that they've
25 got a long list of bad acts, and they're unsavory

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1 characters, and they are not to be trusted. But tell
2 me if I'm wrong.

3 MR. ADAMS: You are correct. I don't think
4 they have a fair trial right. We do. So I think
5 those are different. And if they come all dressed
6 up, we'll probably talk about how they changed
7 outside for court, and got out of their shackles,
8 with -- probably with Bryan Acee's assistance and
9 escorted in. That would be my anticipation here, six
10 weeks out from trial.

11 THE COURT: All right. So I guessed
12 something right.

13 Mr. Castellano.

14 MR. CASTELLANO: Ultimately, when it's all
15 said and done, and the Court makes its decisions, I
16 think we will, and probably the defense, will ask the
17 Court to make defense-specific decisions that
18 minimize the risk of prejudice. So ultimately, we'll
19 probably have to make a record on the Court's
20 decisions. So we just want to be mindful of that,
21 avoiding the error on the record.

22 Related to shackles, I have seen the
23 marshal service put things on the shackles that
24 silence them sometimes so you don't hear them under
25 the table. So that's another option. It's either

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1 | tape or cloth.

2 Related to the clothing of the security
3 personnel, I think, in some ways, it may be
4 impractical for some of them to have a suit every
5 day. And it may not work with their other --
6 otherwise, their attire, for purposes of
7 transportation and whatnot. But I think, as long as
8 we talk about it and have it squared away ahead of
9 time, we can get that addressed.

20 The shackles, I think, are doable. I can
21 tell you that if -- and I'll go back and listen in
22 the jury room, but for example, I've been working out
23 of the vestibule here. I can't quite navigate this
24 building, so I've just been working out of the
25 vestibule. I cannot hear anything in here. As soon

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1 as I open the door to stand over here to come in,
2 it's noisy. And so it is fairly noisy in here, and I
3 cannot hear a word in the vestibule. Assuming that's
4 the same acoustics that you have in the jury room,
5 then it would be normal procedure for me -- and we'll
6 talk about this when we get to the pretrial
7 procedure -- I'm going to put the burden and
8 obligation on Government, on me, my staff, clerks,
9 everybody. We're going to be staring at that defense
10 table to make sure we have every defendant here
11 before the jury comes into the room.

12 So, you know, I'll have to ask the men
13 don't sit there and move your legs a lot. Don't
14 create noise. We're trying to make sure the jury
15 doesn't know about the shackles. So you're going to
16 have to be careful with that.

17 Ms. Wild, are you on the phone?

18 THE CLERK: Yes, sir, I am, but I've been
19 on and off dealing with another case of yours, so
20 I'll have to review the transcript to understand all
21 this discussion in totality.

22 THE COURT: Okay. What I was going to
23 propose is, I don't want to put Mr. Mickendrow on the
24 spot to just shoot from the hip with all this that
25 all of us have probably been thinking about for

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1 months. I was going to suggest a couple of things.
2 One is that you get the transcript, and you review
3 it. If you want to get a copy of it, give it to Mr.
4 Mickendrow, so that he can review it. I think it
5 would be also good if the marshal reviewed it. So I
6 think if you'd get those transcripts and review it.
7 And then, if I could get you to maybe sit down or
8 talk on the telephone with Mr. Mickendrow, and if
9 necessary, Marshal Candelaria, bang out -- I mean,
10 you've done enough trials with me, you know where I'm
11 going to want to go, and where I want to end up; work
12 with the marshals to try to come up with the best
13 game plan we can, that's most consistent with
14 prejudice being minimized to the defendants, without
15 sacrificing the security that the marshals have to do
16 their job. And then, let's come back, through me,
17 with a plan that we propose to the parties, and then
18 either we'll have to tell them that's what we're
19 going to do, and they'll have to make a record at
20 that point, or we'll just have to -- or we'll see if
21 there is some tinkering that we can do to improve the
22 plan.

23 Does that sound like a plan, Ms. Wild?

24 THE CLERK: Yes, sir.

25 THE COURT: All right. Mr. Mickendrow,

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1 again, I don't want to put you on the spot, because I
2 wanted to just invite you to come and listen, and
3 understand the process that we're going through, and
4 the important role you're going to be playing in this
5 trial, and how we want to work with you, and don't
6 want to just dictate things to you. We want to work,
7 and be a partner with you in this.

8 If you do want to say some stuff, you're
9 welcome to. If you want to just demure, and work
10 with Ms. Wild and see what we come up with.

11 MR. MICKENDROW: Judge, if you don't mind,
12 A Chief Barela is here, and he would like to say a
13 few words.

14 THE COURT: All right. Mr. Barela, you're
15 welcome to say --

16 CHIEF BARELA: Jim Barela, Chief of the
17 U.S. Marshals. I just want to assure everybody that
18 it's not our first rodeo. We've all done this
19 before. And, of course, with security being an
20 important part of it, that's our number one priority.
21 But I can guarantee -- we don't want to do anything
22 to cause any marshal responsibility for any mistrial
23 or anything. So we've done this before. And all of
24 your concerns I've heard today, I've seen them
25 throughout states, how they've all been handled. And

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1 we'll get a good medium, like the Judge said, with
2 Mr. Mickendrow working with Ms. Wild, we'll get a
3 medium. Somebody may not be always be happy, but our
4 priority is security, and then definitely not a
5 mistrial. So all your defendants -- excuse me,
6 everybody, to include witnesses and everybody, is
7 treated equal.

8 And we work with the clerk's office, not
9 only Ms. Wild, but here, to set things up with the
10 tables different, so that juries will not have any
11 bias by seeing anybody in custody. And we'll be in
12 suits -- deputies in suits. We've handled all those
13 issues before. And we'll work with Ms. Wild and come
14 up with a good solution I think you guys will be
15 happy with, okay?

16 THE COURT: All right. Thank you,
17 Mr. Barela. Appreciate it.

18 Mr. Castellano, do you have anything
19 further on it?

20 MR. CASTELLANO: Yes, Your Honor. One
21 thing that comes to mind, I think the jury will hear
22 that some of these individuals are still in prison.
23 So I don't think anyone should be surprised by that.
24 I think, if people were arrested when they were not
25 incarcerated, I think it's fair for the defense to

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1 ask: Was this person arrested on the streets? They
2 weren't in jail at the time of arrest. But I think,
3 obviously, some of these things happened in prison,
4 and some of the defendants are still in prison. So I
5 think there will be some testimony to that effect.

6 THE COURT: Okay. Well, y'all know the
7 evidence much better than I. So I'll just have to
8 rely both on the defendants and the Government to
9 alert me. Otherwise, I'll, you know, let the
10 evidence develop at trial. If there is a problem
11 there, y'all need to alert me to it, to see if there
12 is something I need to be doing, or there is some
13 ruling I need to make.

14 All right. So I'm going to put defendants'
15 motion, which is largely Mr. Gallegos' motion, and
16 Mr. Benjamin's on behalf of him, I'll put it aside,
17 and we'll -- I think we have some -- I can see where
18 the Court is going on some of these issues. But we
19 need to work with the marshals before we make some
20 final rulings there.

21 All right. Let's go ahead and take our
22 morning break. When I come back, I want to go to --
23 I think it's Government's 1520. It's the United
24 States' motion in limine to preclude questioning
25 Government witnesses regarding personal information.

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1 So we'll take that motion up when we come back.

2 MR. BENJAMIN: Your Honor, if I may -- and
3 I apologize I didn't get this, based on technical
4 difficulties, I just filed a response on 1520.

5 THE COURT: When did you file it?

6 MR. BENJAMIN: I'd say two minutes ago.

7 THE COURT: Oh, okay. All right. Give me
8 something to do on the break.

9 All right. So we'll take that one up as
10 soon as we come back.

11 (The Court stood in recess.)

12 THE COURT: All right. Let's go on the
13 record, and look around. It looks like everybody is
14 here. I want to spend a little time on the phone
15 with Ms. Wild talking about some of the things. She
16 was a little bit in and out of our conversation
17 because of another case that I have up there that I'm
18 going to have to set -- doesn't impact this, but some
19 emergency hearings over the next few days, next week,
20 something like that. So I need to work with her and
21 fill her in where she had not heard what we were
22 talking about. I talked to her about maybe some
23 approaches, sort of my philosophy on some of this.
24 What I was looking to gain. We'll try to get back
25 with you pretty quickly, and see if we've got a game

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1 plan that everybody is comfortable with.

2 There was one motion that we skipped over
3 that I want to come back to. I think we've covered
4 it. But I want to make sure that there is nothing
5 more that needs to be said on that. And I think Ms.
6 Sirignano, it's your motion, it's number 1517. It's
7 the opposed motion in limine to exclude co-defendants
8 statements. If I understand what this one is -- and
9 correct me if I'm wrong -- you don't want things
10 admitted into trial under the co-conspirator
11 exception until there is a James hearing. And we're
12 in the middle of that, so there is going to have to
13 be some rulings on that. You raised some Bruton
14 issues. We've talked a lot about those. I made some
15 preliminary rulings in some of the motions to sever
16 about how I view Smalls, and that. Is there anything
17 else in your motion that we need to deal with, that
18 you need guidance on?

19 MS. SIRIGNANO: No, Judge. It was just
20 filed to make the record regarding the matters that
21 you just stated. And there are some Bruton issues.
22 And I believe the Government did say today that they
23 were looking into those three specific categories
24 that you just mentioned. So I think we're fine
25 there.

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1 THE COURT: All right. Anybody else on the
2 defendants' side have any issues on that that they
3 want to raise?

4 Mr. Castellano? Mr. Beck, have anything on
5 that.

6 MR. CASTELLANO: No, Your Honor.

7 THE COURT: All right. So I'll put that
8 aside. I think we're in the middle of the James
9 hearing, and I know we've got some Bruton issues down
10 the road. But I've given some guidance on the
11 motions to sever as to how I'm going to deal with
12 some of those issues.

13 MS. SIRIGNANO: Judge, yesterday you asked
14 me to talk to Ms. Waters about the real-time and
15 daily transcripts, and I did that by email. And over
16 the break talked with Ms. Bean, and we've agreed to
17 three real-time terminals for the defense. And then
18 daily transcripts only for issues as needed. And
19 this was something that Ms. Waters agreed to. So
20 we'll do the authorization and we'll get that moving,
21 Your Honor.

22 THE COURT: All right. If she's
23 comfortable with it, I'll approve it.

24 MS. SIRIGNANO: The other little
25 administrative issue that I was reminded to request

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1 of the Court was we'd like to have permission for our
2 clients to bring their tablets during the trial, if
3 that's satisfactory.

4 THE COURT: Why don't you do this: I don't
5 have any problem with that, but can you talk to the
6 marshals, talk to Ms. Waters, see if there is any
7 expenses that I need to be aware of. But as far as
8 me, if the marshals -- does the Government have any
9 problem with that? Do you have any issue with that?

10 MR. CASTELLANO: No, Your Honor.

11 THE COURT: All right. So I don't have any
12 problem with it. The Government doesn't have any
13 problem. Ms. Waters, marshals don't have any
14 problem, then y'all can go ahead and do that.

15 MS. SIRIGNANO: Thank you, Judge.

16 THE COURT: Anything else?

17 MS. SIRIGNANO: No, Your Honor.

18 THE COURT: All right. So let's go to the
19 United States' motion in limine to preclude
20 questioning Government witnesses regarding personal
21 information. It seems to me -- here's the line I
22 would sort of draw, or propose for the parties
23 here -- when the Government puts their witnesses on,
24 I always allow each side a little bit of leeway to
25 put personal information on, so that they can

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1 introduce to the jury, so the jury has some sense of
2 who they're talking to.

3 So I'll take my cues from the Government.

4 If the Government wants to do a little, a lot, that's
5 their business. But you will be opening the door.

6 So whatever you sort of do with them, then it seems
7 to me you've got to be careful, or otherwise, it
8 gives the defendants a little bit of leeway. So I'll
9 look for you to define the scope of the information
10 that you want the jury to know about the witness.

11 But, otherwise, I can't think of any reason that the
12 defendants would need to get into the personal
13 information of the Government's witnesses. So I'd be
14 inclined to grant that motion.

15 Anybody -- well, it's your motion. It's
16 the Government's motion. I don't know if you filed
17 it, Mr. Beck?

18 MR. BECK: Yes, Your Honor.

19 THE COURT: Does that line make sense to
20 you?

21 MR. BECK: Yes, Your Honor.

22 THE COURT: All right. How about the
23 defendant, Mr. Castellano?

24 MR. CASTELLANO: One thing that we'll -- or
25 may come up for purposes of impeachment is, I think

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1 the FBI, for at least one witness paid for a trade
2 school for that witness, so that person could have a
3 trade and work out on the streets. What I'd like to
4 do is indicate that the Government paid for him to go
5 to trade school, without necessarily stating what
6 that trade is. In other words, it would make it
7 harder for people to find him if they don't know what
8 the trade is. I'm not sure it's relevant to know
9 what that is, other than they provided him a trade.

10 THE COURT: So the FBI has paid one of the
11 cooperating witnesses money for a trade school?

12 MR. CASTELLANO: Yes. At least one.

13 THE COURT: All right. I see what you're
14 saying. All right. I have no problem with that, but
15 I'll listen to the defendants. But can the
16 defendants live with this sort of the way I've
17 structured the personal information? Mr. Benjamin?

18 MR. BENJAMIN: Your Honor, as I said in my
19 response, I can't think of --

20 THE COURT: Tell me what number your
21 response is. I'm sorry. I read it, but I don't have
22 it tied to the -- paper clipped to the motion.

23 MR. BENJAMIN: 1586, Your Honor. It was
24 the one that was filed, I think probably 20 minutes
25 now --

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1 THE COURT: Yeah, you warned me about that.

2 Yeah, I did get it. All right. Go ahead.

3 MR. BENJAMIN: Your Honor, and the response
4 essentially ends with the fact that I don't know how,
5 and in trying cases normally, personal information
6 does not come up. And the witness that Mr.
7 Castellano is talking about in that trade school
8 doesn't affect Mr. Gallegos. So I would let the
9 defendant that's affected by that decide whether it's
10 relevant or not. And I think they could probably
11 approach, would be the course.

12 But this motion, and in my response
13 specifically, and the reason I wanted to get it on
14 file, I think dovetails into what we were talking
15 about, the appearance of innocence. The motion that
16 I filed in 1586 has about two pages that deals with
17 an appearance, that if one takes that at face value
18 regarding Special Agent Acee, one can interpret
19 things in a whole different way.

20 And so we have defendants that are sitting
21 here, that the Government in its -- in 1520 starts
22 making what I would refer to as scandalous
23 allegations that they're going to do things. But we
24 haven't seen that done. And the concern I have with
25 Document 1520 is it's a repeat action by the

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1 Government to attempt to scare the Court into
2 security concerns that we just saw addressed in the
3 appearance of innocence. And that's why my 1586
4 starts out with detailing essentially the assault on
5 the house that occurred in Southern New Mexico. And
6 so I raise it --

7 THE COURT: Well, interestingly enough,
8 this motion is usually filed by the defendants.
9 Because they don't want the Government witness to get
10 on there, and they talk about the Government witness'
11 military history, and the fact they served in Iraq,
12 and they've been in government service for 20 years.
13 And it's a big windup to, you know, the fact that you
14 need to believe this Government witness, so in some
15 ways, it seems to me we're just saying the Government
16 witnesses, cut it out. They're not going to sit
17 there and talk about their kids and family, like they
18 do in some trials. And you're not going to get to
19 bring it up either. So it's a little bit of a
20 cleaver cut, but it seems to me it cuts probably
21 pretty fairly for both sides. Your thoughts?

22 MR. BENJAMIN: That's -- I agree with the
23 Court.

24 THE COURT: All right. Well, we'll have to
25 obviously play it by ear. There may be some

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1 testimony -- is everybody comfortable with the one
2 witness, as far as we not -- we get into the trade
3 school, that they paid for a trade school, but does
4 anybody need to get into what kind of trade school?

5 I don't know what the trade school is, so I'm not --

6 MR. CASTLE: Judge, I think we have to know
7 what kind of trade school it is before we know what
8 it is. If it's something -- I don't know what it is.

9 THE COURT: Does the Government have
10 problems sharing that with the defense lawyers?

11 MR. BECK: I think it's disclosed in the
12 materials that we disclosed for Giglio. So I think
13 they can probably find it. We don't really have a
14 problem disclosing it to them outside of that.

15 THE COURT: Why don't you tell Mr. Castle
16 what it is; otherwise, I'm going to assume that the
17 trade school is not coming in. If you want to
18 reraise it, Mr. Castle, after you find out what it
19 is, you can. But we won't get into personal
20 information, the Government witnesses.

21 You rise, Ms. Duncan?

22 MS. DUNCAN: Your Honor, on behalf of Mr.
23 Baca, we're comfortable with the line that the Court
24 has drawn. We just ask that -- there may be
25 instances where, for example, the type of employment

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1 of a particular witness is relevant for impeachment
2 or credibility. And so we could clearly raise that
3 with the Court before delving into that
4 cross-examination. But I'd reserve the right to
5 argue that certain personal information may be
6 relevant for a very particular purpose.

7 THE COURT: Okay. Well, when you say type
8 of employment, I assume that when the Government does
9 their introduction, they're going to identify the
10 person as to what his job -- his or her job title is,
11 where he or she works, probably what the job entails.
12 So I'm not including that in personal information.
13 So I would think that what that person does as far as
14 their job is fair game, both by the Government and by
15 the defendant. Because that goes to personal
16 knowledge, how they know what they're testifying
17 about, and those sort of things. Does that satisfy
18 your concern? And personal information, I'm thinking
19 of kids, spouses, where you live, that type of stuff.

20 MS. DUNCAN: Yes, Your Honor. That answers
21 one of my bigger concerns. But I still -- I could be
22 arguing something with the Court that ultimately is a
23 total nonissue. But I think that there may be some
24 times when personal information is relevant for
25 cross-examination. So I would just reserve the right

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1 to raise it with the Court, which I would do before
2 asking that question.

3 THE COURT: All right. But, otherwise,
4 we'll probably stick pretty closely to this. And if
5 my pretrial rulings are going to mean anything, I'm
6 going to have to probably give them a presumption of
7 applying throughout trial.

8 All right. So with that caveat about what
9 I define personal information as, that will be the
10 ruling on that motion on the personal information
11 motion.

12 All right. The next motion, Mr. Blackburn
13 and I have probably exhausted what I have to say on
14 this issue in a trial that he had. What was that
15 fellow's name? Courtney?

16 MR. BLACKBURN: Yes, Your Honor.

17 THE COURT: So while I am very sympathetic
18 to -- probably shows my Libertarian and Originalist
19 leanings to allowing jurors to know what the
20 sentencing parameters are, and also the consequences
21 of a conviction, the Tenth Circuit and the Supreme
22 Court have said that my thoughts are not very
23 important, and that they have pattern instructions
24 here. And so I think I am forced by the controlling
25 law to grant the United States' motion in limine to

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1 exclude any reference to punishment or sentencing,
2 and tell the jury that they should put that out of
3 their minds. So I'm inclined to grant the motion.

4 Anything the Government wants to say on
5 that motion, Mr. Beck?

6 MR. BECK: No, Your Honor.

7 THE COURT: All right. Defendants, Ms.
8 Fox-Young?

9 MS. FOX-YOUNG: Your Honor, what is the
10 document number?

11 THE COURT: This is 1521.

12 MS. FOX-YOUNG: Okay. I don't have it up,
13 but it's my recollection that the Government asked
14 the Court to preclude any questioning of the
15 cooperators as well.

16 THE COURT: Well, I thought yesterday when
17 we did it, there was no request from anyone on either
18 side to take out or redact the portion of the plea
19 agreement that dealt with the sentencing.

20 MS. FOX-YOUNG: That's right. And so, Your
21 Honor, where the Government says the United States
22 requests the Court prohibit the defense from
23 eliciting testimony about potential punishment from
24 any of the Government witnesses, I think that's the
25 only place where we would take issue on behalf of Mr.

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1 Perez. I mean, we take issue, but we understand the
2 controlling law. But on behalf of Mr. Perez, I
3 think --

4 THE COURT: Well, I've read Mirabal -- it's
5 been a while, it's not -- well, it's not fresh in my
6 mind -- it looks like it's a very recent case. Does
7 Mirabal prohibit the defendants from eliciting
8 testimony about potential punishment from Government
9 witnesses? Does it say that?

10 MS. FOX-YOUNG: Your Honor, I'll have to
11 pull it up. This isn't our motion, it's the
12 Government's motion. I'll pull it up right now.

13 THE COURT: All right. Ms. Duncan?

14 MS. DUNCAN: Your Honor, to answer the
15 Court's question, I did read Mirabal today, and no,
16 it does not. That case was from Judge Johnson, and
17 he allowed the defense to impeach the witness with --
18 and I'll pull it up right now -- with his plea
19 agreement -- about the plea agreement and the
20 expectation of a lighter sentence because of his
21 cooperation. What the judge didn't allow the defense
22 to do was get into the specifics of the guidelines.
23 And what the Tenth Circuit held -- they presumed that
24 was a confrontation clause violation by limiting
25 cross-examination, but said that, given the evidence

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1 in the case, any error was harmless.

2 THE COURT: Okay. Well, I'm not hearing
3 from anybody that anybody wants to redact or exclude
4 that portion. It was in your motion, Mr. Beck, but
5 are you comfortable with where I'm coming out, that
6 defendants' sentencing punishment -- we'll tell the
7 defendants that that is off limits for them, and the
8 defendants -- nobody can discuss sentencing and
9 punishment as far as defendants. But it will be
10 still fair game for cooperating witnesses?

11 MR. BECK: Yes, I think that's fair.

12 THE COURT: All right. Everybody
13 comfortable where we've drawn the line? All right.
14 So the Government's motion is granted, with the
15 exception of sentencing and punishment for
16 cooperating witnesses will still be fair game.

17 And yesterday we talked about motion number
18 1522, and I think everybody was in agreement that
19 that probably was a good idea. So that Fed Ex
20 package reminds me that all CJA vouchers, unless that
21 package contains some or there are some on my desk
22 back in Albuquerque, I'm totally caught up. I had a
23 few questions on some of these, some of you will be
24 getting a little bit more questions from me than in
25 the past. But they're all off my desk, unless that

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1 package contains some more, or there are some back in
2 Albuquerque. So I'm pretty caught up.

3 So this is the United States' motion. I
4 think everybody was in agreement it should be
5 granted, that the Government would be permitted to
6 present witness testimony in installments. What I
7 understand that to be is that they're going to
8 package and group their story together. I think
9 everybody agreed that that probably was a good idea
10 to try to manage the workload in this case. And, in
11 fact, we're encouraging the Government to do that,
12 and to also then disclose as much of that in advance
13 as they can, so that defendants can know who they'll
14 be facing in the coming days. And what that will
15 mean, so everybody is clear -- and at least what I
16 think it means is that, for example, Mr. Acee can
17 come up several times during the Government's case,
18 as he's done in the James hearing. It will sort of
19 be packaged. And there may be some other defendants
20 where they do the same thing. We'll be permitting
21 that. I think they can do it anyway. But we'll
22 permit them to call and re-call and maybe re-call
23 several times some of the witnesses.

24 Did I package your motion correctly? Is
25 this yours, Mr. Beck?

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1 MR. BECK: Yes, you did, Your Honor.

2 THE COURT: Anything else you want to say
3 or need to get the green light on this?

4 MR. BECK: No, Your Honor.

5 THE COURT: All right. How about from the
6 defendants? Anybody disagree with how we're going to
7 allow the Government to put on their trial, their
8 case? Mr. Adams?

9 MR. ADAMS: Judge, I don't have a problem
10 with that. And I think it makes a lot of sense. I
11 did want to just make sure we're clear. I'm hearing
12 you say you'll grant them the latitude to do that,
13 but in exchange, they need to really play fair with
14 us about when they call somebody, whether they're
15 going to re-call them later. Because I anticipate we
16 will have lengthy crosses, some of which would be
17 relevant to different times they call the witness.
18 So we'll need to make some choices based on whether
19 they're intending to call somebody two, three, or
20 four times. And that when they give us the overview
21 of the case, they'll let us know which people they
22 intend to call multiple times so we can plan
23 accordingly.

24 THE COURT: Could the Government do that?
25 If you know you're going to be calling witnesses

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1 multiple times, you let the defendants know, so they
2 can figure out when to do their robust
3 cross-examination? Is that basically what you're
4 saying, Mr. Adams?

5 MR. ADAMS: I am. I would hate to put
6 jurors to sleep through the same cross four times.

7 MR. BECK: Yes.

8 THE COURT: So we'll have that agreement.
9 We'll also have an agreement you won't put the jurors
10 to sleep.

11 MR. ADAMS: I hope that goes without
12 saying. If so, I might need to reserve the issue of
13 bringing a drone into the courtroom.

14 THE COURT: No drones, no drones.

15 Mr. Castle?

16 MR. CASTLE: Your Honor, I would just note
17 that such an order should go both ways, so that the
18 defense can also present in installments in a joint
19 trial like this. I don't know if there is any
20 objection to that, but not seeing any nodding heads
21 from the prosecution table. I may have need for
22 Count 1 and 2 to call Agent Acee also, and then for
23 Count 3, be another. I'm sorry, I'm not loud enough
24 probably but --

25 MR. BECK: That's fine.

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1 THE COURT: All right. So those agreements
2 will then cut both ways as far as packaging.

3 Mr. Walz, is Ms. Rodriguez okay? Are you
4 okay back there?

5 MR. WALZ: We're fine.

6 THE COURT: All right. Talking about
7 jurors asleep. We don't want defendants sleeping.

8 MR. WALZ: She's okay.

9 THE COURT: All right. Nothing else on
10 that motion, then, that's how the Government will put
11 on their case and the agreements we have there.

12 All right. Let's talk about the United
13 States' motion in limine to allow transcripts
14 containing English translations of recorded Spanish
15 conversations as substantive evidence. I've heard
16 some tapes. I've heard some -- certainly read a lot
17 of transcripts. The transcripts have been in
18 English. So I guess I, A, don't know what the extent
19 of the problem is, how much of the conversations are
20 in Spanish, and how much of them are in English. I
21 guess my sort of -- the first cut is -- and I'm not
22 sure I have an ultimate solution to offer. But my
23 thoughts are that unless there is an agreement among
24 the parties what to do with the transcripts, the
25 transcripts should not come into evidence. They

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1 should be used as demonstratives. The real evidence
2 should be the tapes themselves. We'll be talking in
3 the pretrial conference portion about the use of
4 JERS, so we'll be putting these on electronically for
5 the jury to listen to again. If it's just a
6 sprinkling of Spanish words that are used, this is
7 just a proposal. I mean, I'm working with you. I'm
8 wondering if we can come up with a little glossary,
9 or something that gives the jury the definition of
10 those Spanish words that are sprinkled. If, on the
11 other hand, you tell me it's whole transcripts that
12 are in Spanish, I'm not sure what else we can do
13 other than maybe admit those transcripts because of
14 the English requirement for federal court, that the
15 evidence has to go back. So I guess my proposal
16 would be, if it's a smattering, transcripts don't go
17 back, discs do. Discs will then go on the JERS
18 system, which we'll talk about, if you're not
19 familiar with the JERS system in federal court in the
20 District of New Mexico. So they'll have the
21 recording back there ready to be played as soon as
22 they go back to deliberate. The transcripts won't
23 go. If a conversation or conversations are totally
24 in Spanish, the transcript should come in. If there
25 is a disagreement among the transcripts, you can

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1 either argue it with me and I'll work it out, or if
2 it's so severe, we might have competing transcripts.
3 But those would be my thoughts as to how to deal with
4 the transcript in Spanish that are in the
5 conversations.

6 This is motion 1523. Mr. Beck, is this
7 your motion? Mr. Castellano, is it yours?

8 MR. CASTELLANO: Yes, Your Honor.

9 THE COURT: All right. Could you live with
10 what I've proposed? Do I not understand the
11 situation? What's your thoughts?

12 MR. CASTELLANO: I think you understand the
13 situation. I think that when we're talking about the
14 Spanish language transcripts, it's really a
15 smattering. I think we're talking about words and
16 phrases, as opposed to entire conversations.

17 THE COURT: If you had to guess, of the
18 number of Spanish words that we might -- if we were
19 putting a glossary together for the jury, what would
20 you say -- what number would you say would go on that
21 glossary or index?

22 MR. CASTELLANO: My guess is that maybe 5
23 percent of the conversations would have words or
24 phrases. I don't think it's a large --

25 THE COURT: So it's only 5 percent of the

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1 transcripts?

2 MR. CASTELLANO: I think so, Your Honor.

3 THE COURT: And then how many words off
4 those transcripts do you think they'd be looking at?

5 MR. CASTELLANO: I'm not sure. I don't
6 think it's a large number. But I think there would
7 be some work to put together a glossary. But I don't
8 think it's a large number of words on any given
9 transcript.

10 THE COURT: All right. It seems to me that
11 that's probably the approach. Can you live with
12 that, Government?

13 MR. CASTELLANO: I think so. If we run
14 into problems putting together a glossary, one issue
15 may be whether there is an agreement on terms or not
16 with the defense. So we may get pushback there, we
17 may not.

18 I think I heard the Court say that the
19 transcripts will not go back to the jury. Would you
20 consider allowing the transcripts to go to the jury
21 to aid in listening, with an instruction which says
22 the transcripts are only to aid you in hearing the
23 transcripts. If there is any discrepancy between the
24 two, the tape recording prevails, and it is the
25 evidence?

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1 THE COURT: Well, I'll certainly consider
2 it. I'll see what the defendants say. If the
3 defendants oppose the transcripts being back there,
4 then I probably will go for the defendants on that.
5 But I'll certainly consider it.

6 Anything else on your motion, Mr.
7 Castellano?

8 MR. CASTELLANO: No, Your Honor.

9 THE COURT: All right. Let's hear from the
10 defendants. Ms. Sirignano?

11 MS. SIRIGNANO: I think Mr. Cooper was
12 before me.

13 THE COURT: I thought he was over there
14 sneezing.

15 MR. COOPER: We would oppose the use of the
16 transcripts. And I don't think that using a glossary
17 is a good idea either. I think the jury has to hear
18 the evidence from the witness in that chair. The
19 Government is going to say -- ask the witness a
20 question, and the witness is going to say, Well, he
21 needed to get his huesos. What does huesos mean?
22 Huesos means bones. The juror has to -- every one of
23 these jurors has to hear that testimony, go back into
24 the jury room and remember that huesos means bones.
25 And I think that's how we deal with the

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1 English-Spanish issue.

2 THE COURT: All right. So if I understand
3 your proposal from the defendants -- we'll hear from
4 everybody else in a minute -- transcripts go back.
5 Are they part of evidence or not part of evidence?

6 MR. COOPER: No, I don't think transcripts
7 go back. I don't think transcripts should be used.
8 If it's 5 percent of the transcripts, and only a few
9 words or phrases, I think it's incumbent upon the
10 Government to ask the question: What does huesos
11 mean? What does orale mean? What does whatever that
12 mean? They translate into English, because it's
13 going to be a Spanish speaker that's going to be
14 testifying as to what huesos means or orale means or
15 whatever the Spanish term is. And this jury hears
16 what that testimony is, and they have to rely on the
17 evidence that comes in through that witness.

18 THE COURT: All right. If I allow the use
19 of transcripts during the trial, what's then your
20 position about whether they go back or not? Well,
21 first of all, let me ask a foundational question.
22 Should they be admitted into evidence or not
23 admitted?

24 MR. COOPER: No.

25 THE COURT: Okay. What about going back to

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1 the jury room? Because remember what's going to
2 happen in the jury room, they're going to be
3 listening -- if they decide to review the evidence in
4 this detail, they will be able to punch up and listen
5 to the recordings. Do you want them looking at the
6 transcript at the same time or not?

7 MR. COOPER: Judge, I think it ought to be
8 determined at the time, during the trial, on a case
9 by case basis, and we see how much of that testimony
10 is in English, how much is in Spanish, and then make
11 a determination at that point; not here today, not
12 having seen what that testimony is, and how much of
13 it is in Spanish.

14 THE COURT: Okay.

15 MR. COOPER: So I would say we ought to
16 wait for the trial.

17 THE COURT: How close is Mr. Cooper's
18 position to the rest of the defendants? Start with
19 you, Ms. Sirignano.

20 MS. SIRIGNANO: Your Honor, I'd agree with
21 about 95 percent with Mr. Cooper.

22 MR. COOPER: I object.

23 MS. SIRIGNANO: My only concern, Judge, is
24 that these transcripts that have been provided by the
25 Government are incomplete, and they're unreliable.

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1 As we've seen during the James hearing, there is big
2 gaps of unintelligibles, UIs in parentheses,
3 throughout these transcripts. So I personally would
4 not like these transcripts going back to the jury, as
5 they're nonevidentiary. And we have to first start
6 out with whether or not we could actually use them
7 here during the trial first, before even getting to
8 the discussion that they should go back. And I don't
9 think they should go back at all.

10 THE COURT: All right. Mr. Maynard?

11 MR. MAYNARD: And I'm of the same position.
12 I think they may be demonstrative, they might help
13 the jury in listening to the tape. But the case law,
14 basically, is they're not substantive evidence, and
15 they don't go back to the jury room. And with
16 respect to the Spanish translation issue, I think
17 from the tapes that I've listened to and the
18 transcripts that I've read, most everything is in
19 English. And there is a smattering of Spanish
20 phrases and words.

21 And the best approach would be, at the time
22 the jury is listening to the tape, with a witness on
23 the stand, who probably was participating in the
24 conversation, let that person express and translate
25 what the meaning is, especially because sometimes

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1 words can have different shades of meaning in a
2 different context.

3 THE COURT: Okay. All right. Well, let
4 me -- I'm hearing different things on the
5 transcripts. Are the defendants opposed to the use
6 of transcripts in the courtroom? Is that what you're
7 saying, Ms. Sirignano? I mean, I can probably go
8 with the defendants that they, A, are not admitted
9 into evidence, and B, they're not going to go back to
10 the jury room. But I guess I'm leaning toward
11 allowing the transcripts to be available to the jury
12 during the trial.

13 MS. SIRIGNANO: Judge, the transcripts that
14 we've been given by the Government have huge gaps in
15 the -- from the recordings, either because the
16 recordings --

17 THE COURT: But isn't that -- I mean, I
18 guess my reaction to that, isn't that an honest
19 transcription, rather than having the court reporter
20 guessing what is said there -- which would be a
21 bigger concern to me -- they're just admitting they
22 can't figure out what it is, which will probably be
23 the reality?

24 MS. SIRIGNANO: Well, we've got competing
25 transcripts on some, Your Honor. And this is

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1 something that we're going to have to decide pretrial
2 on these transcripts. As some of them -- some of the
3 versions aren't necessarily what our
4 transcriptionists have come up with. So this is
5 probably something that we're going to need to take
6 up pretrial, with competing transcripts. I'm not
7 saying all, but I think some of them aren't
8 completely accurate, which is why we had them
9 transcribed.

10 THE COURT: But that's a separate issue
11 than whether the jury has no transcripts. Are you in
12 agreement that some transcript ought be in their lap
13 in the trial while they're listening?

14 MS. SIRIGNANO: If they're accurate, Judge.
15 That's the best that I can come up with. And I'm not
16 saying that all of them are right now. That's my
17 problem.

18 THE COURT: Okay.

19 MR. MAYNARD: There is another issue with
20 the transcripts and the recordings, Your Honor, in
21 that some of the conversations are fairly lengthy,
22 and the transcripts are long, and yet maybe only 10
23 percent of a 10-minute conversation is relevant. So
24 we're going to have to address the issue of, Well, on
25 this conversation out of this exhibit or Bates number

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1 transcript, what is the Government going to offer?
2 The entire conversation? Or just what relevant
3 excerpts are going to be allowed to come in? And, of
4 course, there is also going to be issues over not
5 just translating the Spanish phrases and words into
6 English, but there is going to be witnesses
7 attempting to interpret or -- the context of the
8 conversation. And the best evidence of the
9 conversation is just the conversation itself, the
10 relevant portions.

11 THE COURT: All right. Thank you, Mr.
12 Maynard.

13 Mr. Cooper.

14 MR. COOPER: A couple things, Judge. When
15 the jurors are allowed to have transcripts, it lends
16 more importance to that particular testimony. It
17 creates "super evidence" for that particular
18 testimony. So I would object to the use of the
19 transcripts at all. The other thing is when we have
20 transcripts, that translation is necessarily the
21 transcriptionist's idea as to what the individual
22 said in Spanish, and what he or she thinks it ought
23 to mean in English. So I think there is a
24 confrontation sort of an issue there.

25 THE COURT: Well, on the transcripts, is

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1 somebody interpreting -- are they putting a
2 translation of Spanish next to the words?

3 MR. MAYNARD: There are a few transcripts
4 where some words -- where the English is next to the
5 Spanish word, and it's in parentheses.

6 THE COURT: Put in brackets or something.

7 All right. Any of the other defendants
8 want to speak on this? Ms. Fox-Young?

9 MS. FOX-YOUNG: Your Honor, it sounds like
10 the Court is going beyond the translation issue, and
11 is inclined to allow transcripts for all recordings;
12 is that right?

13 THE COURT: Well, the motion is broad in
14 that it allows transcripts. So before I can
15 determine whether it includes English translation,
16 I've got to, I guess, take the first issue, and that
17 is whether there is going to be transcripts at all.

18 MS. FOX-YOUNG: Okay.

19 THE COURT: Because if there is no
20 transcripts at all, I don't have to worry about
21 putting English translations next to it.

22 MS. FOX-YOUNG: Okay. Well, just to
23 reiterate, I think the Government has made clear --
24 this is perhaps something of a nonissue, if there is
25 not much of a translation problem, and not much

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1 Spanish language to deal with, without rehashing
2 everything, for the record, we would oppose providing
3 the jury with transcripts during the course of
4 testimony.

5 If the Court is inclined to come up with a
6 default position, certainly would oppose entering
7 them into evidence and sending them back with the
8 jury. And I do think that there is an accuracy
9 issue. And I think, if the Government can make a
10 showing during trial that it's necessary, for some
11 reason, perhaps the Court could take it back up. But
12 our position would be, with no showing and no basis
13 for the Court at this point, as to how that would be
14 helpful for the jury, we'd oppose it.

15 THE COURT: All right. Anybody else? Any
16 other defendants want to speak on this issue? Mr.
17 Maynard?

18 MR. MAYNARD: Just, again on that point,
19 Your Honor, the best evidence -- if the tape, to the
20 extent that it's fairly clear and intelligible, the
21 jury can hear it. They don't really need the
22 transcript to help them out.

23 THE COURT: All right. Thank you,
24 Mr. Maynard.

25 Anybody else on the defense side.

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1 All right. Mr. Castellano, I assume you
2 still, after listening to the defendants, want
3 transcripts in the jurors' lap during the playing of
4 these tapes?

5 MR. CASTELLANO: Yes, Your Honor. And the
6 reason being that jurors, and people in general, take
7 in information differently; some are auditory
8 learners, some are visual learners. And I think even
9 this Court, when reading the jury instructions to the
10 jury, puts them on the visualizer so the jury can
11 read and follow along. And that's for a reason.
12 That's because people take in information differently
13 and understand better when they can both see and
14 hear, so you're using more senses to understand the
15 evidence. And so I think that the transcript
16 certainly is an aid to the jury. And I agree that
17 the recording is the evidence.

18 Related to a point Mr. Maynard made, I
19 agree that sometimes excerpts are better because you
20 might have a 20-minute conversation. And no one
21 wants to hear a 20-minutes of recording. So there
22 might be a point where there are excerpts. But that
23 also means the defense will have to figure out if
24 there is something that they want from that
25 conversation that we're not using because we're going

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1 to use what's relevant to us, and they might want
2 other points. I do agree that excerpts can be useful
3 rather than listening for 20 minutes.

4 THE COURT: What do you do about Mr.
5 Cooper's point -- and I think somebody else brought
6 it up, too -- if your transcripts have the court
7 reporter or the reporter interpreting the word, would
8 you be better off taking that court reporter
9 interpretation out, and just listing that statement
10 from the witness? What's your thoughts about that?

11 MR. CASTELLANO: It could be done that way.
12 Or if the witness disagrees with the interpretation,
13 saying that's not what it means, that could be
14 clarified. Some of the transcripts, from time to
15 time, have people who are actually involved in the
16 conversation who correct the transcripts after there
17 is a first draft. So that may actually be fairly
18 accurate. I can't speak to all the transcripts. But
19 sometimes the players are allowed to listen to the
20 transcript and make corrections to it before it's
21 finalized.

22 THE COURT: What would be your preference
23 as to the Spanish word being in brackets or not
24 brackets? Would you prefer that they be there, and
25 then there be explanations? Or if the witness adopts

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1 the translation, would you rather pull them out and
2 just do it all by examination?

3 MR. CASTELLANO: I'd prefer to leave them
4 in, otherwise we'll spend the rest of our time
5 correcting transcripts and then redisclosing them to
6 the defense for their take on the redaction. And I
7 think we'll just be doing that up until the trial
8 starts. So I think we go with what we have. And if
9 there are disagreements, then certainly they can be
10 highlighted through examination.

11 THE COURT: Do you see -- it may have been
12 Mr. Cooper raised -- any sort of confrontation clause
13 issues there?

14 MR. CASTELLANO: No, because the witness
15 will be on the stand subject to examination. It
16 would be a confrontation problem if the person could
17 not be cross-examined.

18 THE COURT: All right. Anything else you
19 want to say on your motion? Any other guidance that
20 you need other than these parameters?

21 MR. CASTELLANO: No, Your Honor.

22 THE COURT: All right. Mr. Cooper.

23 MR. COOPER: Confrontation problem is that
24 the translator, the transcriptionist is not here to
25 be cross-examined. It's not somebody else. So I

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1 think that's a confrontation issue, Judge.

2 THE COURT: All right. Anybody else want
3 to have a say before I rule on this motion how we're
4 going to do the transcripts? From the defense side?

5 All right. Well, the transcripts will not
6 come into evidence. I will allow the jurors to use
7 transcripts. The transcripts can remain with the
8 court reporter's translation, or if there is some
9 other etymology as to how that got into the brackets,
10 or the parens, that can be explored either on direct
11 or cross.

12 I don't think there is a -- any sort of
13 confrontation problem here. And if anybody wants to
14 explore this further, I'd be glad to take briefing on
15 it. But it's not coming into evidence. So the court
16 reporter's translation is not coming into evidence,
17 because the transcript is not coming into evidence.
18 It's going to be the audio, the disc that's going to
19 be coming into evidence. So the jury will not take
20 the transcripts back to the jury room. And they will
21 just be used as aids as they listen in here. They
22 will have only the disc or recording in the jury
23 room. So the only thing that's going to be coming
24 into evidence is going to be the transcription.

25 So the Government will produce, identify

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1 the transcripts that they're going to be using at
2 trial. The defendants, then, have a right to
3 challenge that. So Ms. Sirignano, if you don't agree
4 with the translation, talk first to the Government,
5 say: Here is how we think it ought to be translated,
6 or here's the changes we think ought to be made. If
7 they don't agree, then you'll need to submit it to
8 me, and I'll make a ruling. Probably I'll need the
9 tape and the competing transcriptions. See if you
10 can work those out. If you can't work them out --

11 All right. Any confusion? Everybody
12 understand? Everybody got a ruling on that? Did I
13 rule on all the motions there -- all the motions?
14 All right. That's how we will handle transcripts.
15 And I will use the standard jury instruction from the
16 Tenth Circuit on that information, because I think
17 we're doing what the Tenth Circuit normally predicts
18 and requires.

19 All right. So let's go to 1524, which is,
20 again, the United States' motion to preclude
21 eliciting testimony about sensitive government
22 recording devices or programs. I think we may have
23 banged out the compromise, or at least the -- how
24 we're going to deal with this. I hope I can remember
25 everything that we did. But I think that basically

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1 the defendants can ask questions about the recording
2 devices except in two areas. One, they cannot ask
3 questions about the size of the device. And they
4 also can't ask questions about the portals, the
5 recharging information, or other things you might
6 stick into a portal, or how the portal is configured,
7 or what it looks like.

8 Are those the two areas that we agreed
9 would be kept confidential, Mr. Beck?

10 MR. BECK: I think that's right, Your
11 Honor.

12 THE COURT: So are you comfortable, then,
13 that I grant your motion in part and deny it in part?
14 Everything else is fair game, but those two areas
15 would be off limits?

16 MR. BECK: Well, I mean, I guess I'm
17 thinking about fighting it harder when it's already
18 out there in a publicly filed document. I mean, I
19 think the basis of this motion is also the relevance
20 of asking about details about the recording device at
21 trial, as opposed to for a motion to suppress.

22 I mean, if we think about a motion to
23 suppress in the Fourth Amendment context, once the
24 Court has ruled on a pretrial admission of evidence,
25 and defendants move to suppress, that search, or a

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1 lot of the contentions about why that evidence should
2 be suppressed are not included in the trial.

3 And I think the same goes here. I think
4 the Court should be wary about allowing the
5 defendants sort of free rein for a host of reasons;
6 free rein to go into how they were trained to use the
7 devices, how they secreted the devices in prison, the
8 dimensions of the devices, how they turn them on or
9 off. I mean, certainly, as I've said -- and I've
10 remained with this position throughout -- that's fair
11 on cross-examination, to ask about whether you
12 intentionally turned on or off the devices.

13 What I'm concerned about is -- and I'm not
14 saying anyone would do this; I just think it may be a
15 good time to discuss it here, to talk about what
16 intentions are -- to go down a rabbit hole in which
17 they're going to just, you know, beat this thing to
18 death, and we're going to fall into what happened
19 when Special Agent Williamson was on the stand -- or
20 it may not have been Special Agent Williamson; it may
21 have been Mr. Cordova -- in which we had to kind of
22 wait after every question for whether the Government
23 was going to object or not.

24 And so I think the Court may be wise to be
25 a little bit more heavy-handed here. And just as the

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1 Court admonished us to talk to our cooperators about
2 what's coming in and what's not. I think that the
3 Court may stand by this ruling, and that's fine. But
4 we may also think about how much and why we're going
5 to get into these recording devices. I mean,
6 certainly, as we heard from Mr. Cordova, STIU
7 provided them in the cells as a ruse, that's fair
8 game; that, you know, they may be contraband, I think
9 that's fair game.

10 And again, I think this all may be for
11 naught, because I don't think the defense is going to
12 want to waste a lot of time in trial trying to ferret
13 out this evidence. I just think we all may be wise
14 to just be careful and think about what the purpose
15 of bringing in this evidence is at all.

16 THE COURT: Well, I guess my problem is,
17 last week, if I understood what Mr. Jewkes and
18 Ms. Jacks were saying, is that probably the biggest
19 attack they're going to have at trial is going after
20 Mr. Cordova and other witnesses. And it seems to me
21 they're going to probably -- I don't want to do the
22 defense for them, but they're going to attack every
23 possible angle they can about how Cordova recorded
24 those conversations, including -- you know, maybe it
25 was Mr. Herrera that said this, I can't remember

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1 now -- but was he turning it on or off? Did he know
2 how to function the machine? I guess I need to know
3 what parameters the Government wants imposed.
4 Because, to a certain degree, I think I have to rule
5 this way, I have to say: This is off limits. And
6 then the rest of it I probably can't restrict the
7 defendants. I guess, at trial, if it gets
8 cumulative, if it's gets irrelevant, immaterial, you
9 know, then those objections are always available.
10 But at least going into the trial, I think I need to
11 probably have the Government state this is what they
12 want to be off limits. I tell the defendant: That's
13 off limits. And then the rest of it is at least
14 within their ballgame. It doesn't mean they have to
15 use it, but it's in their ballgame.

16 MR. BECK: And I think -- I mean, I think
17 all of that is fair. As I said, I don't think this
18 is going to be an issue, because I think that the
19 points you're bringing up here are fair game for
20 cross-examination, certainly.

21 I would say, in addition to this list, I
22 think the Government would have concern about going
23 into the specific amounts of times the devices were
24 taken in and out because of battery issues. I don't
25 know that any of the cooperators would specifically

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1 know that information or recall that information.
2 But I could see how that would be used for
3 counterintelligence purposes. And that information,
4 I think, is law enforcement sensitive, in terms of
5 the amount of hours, possibly, that these devices
6 record.

7 On the other hand, you know, I could see
8 that information would be helpful. So, I mean, I
9 wish I was more -- I wish I was being more helpful to
10 everyone in the room. I can see that it's a hard
11 decision for everyone to make. I think that these
12 two areas are a fine line for the Court to draw at
13 this point. And I think we can probably operate on
14 this basis. And if we need to address it, we can do
15 that at a later time. I don't expect that we will.
16 But if we need to, we can bring that up at a later
17 time.

18 And I know the Court can say -- I know the
19 Court always has an open door. I understand if the
20 Court wants to say this is a pretty firm ruling, you
21 better have some really good grounds to address this
22 later since we're moving quickly, which is why I am
23 saying I think these two points are fine to draw for
24 now. I think we could be comfortable with these
25 lines.

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1 THE COURT: You were adding a third one on
2 about the battery. Does that need to be in or out?
3 Can we just live with the two, or do we need to make
4 it a three-point exclusion?

5 MR. BECK: I think we can live with the
6 two. Because I think the battery is going to be
7 important for -- I mean, I think it will be important
8 on both sides. Because, as we'll see here in a
9 couple of days, I mean, there is going to be lots of
10 debate about why there aren't just days and days of
11 recording, right?

12 So I think it's important for our case to
13 establish that, as it's probably important for their
14 case, to establish the opposite. So I think, in this
15 case, it's probably fair game.

16 So I think I've now talked myself in a
17 circle. And I think the Court's two areas are fine
18 for now. We can work with that. If we can't, then
19 I'll have to bring that up.

20 THE COURT: Now, was the Government's
21 concern about the size or the shape? I mean, for
22 example, it would seem to me that everybody needs --
23 the jury, including all of us here in this room --
24 need to convey in some ways the size of this. It's
25 not like Mr. Cordova had a recording bank there, you

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1 know, like a recording studio in his cell next door.
2 But at the same time, we're not going to have one of
3 these devices in the courtroom so somebody can
4 actually show the size. I mean, if Mr. Cordova
5 wanted -- I have no idea if this is right or not --
6 raise his fist and say it was the size of my fist or
7 half the size of my fist, or it was about the size of
8 my finger, would that be okay? So the jury has some
9 sense -- because we're talking about -- we're talking
10 about putting these in cells. We're talking about
11 dropping them in beds. We're talking about a lot of
12 stuff. I think that some information about the size
13 is going to be important to both sides telling their
14 story here.

15 MR. BECK: Yeah, I think that's okay.

16 THE COURT: Is it the shape or the size
17 that's the problem?

18 MR. BECK: I don't necessarily think it's
19 either one, as opposed to getting into details about
20 the specifics of either of those. And what I mean by
21 that is, I think it's okay to say: It's the size of
22 my fist, or it's the size of my finger, because I
23 think that will be important for both sides. I think
24 if we talk about its -- you know, the specific
25 aesthetics; that it looks like X, I think that would

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1 be -- I think that would be a concern, and I think
2 that's where probably the law enforcement privilege
3 overcomes any need for that. I think really 403, and
4 the usefulness of that, versus other reasons for
5 keeping it out, we'll probably keep that out. So I
6 think, generally, if we get into the size. You know,
7 for instance, it's the size of, you know, an MP3
8 player; it's the size of an iPhone; it's the size of
9 a car battery; it's the size of a watch battery,
10 something like that, I think all that stuff is fine.
11 I think, if we start talking about: It looks like X,
12 I think that would be the concern. And I don't think
13 that is probative.

14 THE COURT: Let me -- since I'm probably
15 ignorant the most of what it looks like -- if the
16 person says: It's round or it's square or it's
17 rectangle, it looks like a match box, those sort of
18 things, is that fair game to give some visual
19 description of what the recording device looks like?

20 MR. BECK: I mean -- so I'd like to say
21 yes, and I think that the answer is yes. But I also
22 am not privy to what these things look like. And I
23 don't know whether our cooperators will have readily
24 available that information either. I don't know the
25 conditions under which they use them. So I think

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1 that's fair. I think that's fair to ask circular,
2 rectangular, any other shape they can think of.

3 I guess what I'm getting at is, you know,
4 if for instance someone was going to say: It looks
5 like a leather shoe with a heel in it, and I take off
6 my shoe, and I hold it up to my ear and talk through
7 it, thinking of the Smart show that I watched with my
8 dad when I was little. "Get Smart," thank you.

9 Right. That would be Government sensitive
10 information that we don't want out there. The
11 particular aesthetics of the device. But the size,
12 the shape, those sorts of things I think are fair
13 game. Does that sort of color in where I think the
14 Court should draw the line?

15 THE COURT: I guess. I hadn't thought
16 about if there is some packaging here. But --

17 MR. BECK: I think there may be -- and I
18 think that's what the law enforcement privilege gets
19 at, is I think that if, for instance, they -- I mean
20 I'm trying to think -- I don't know these things, so
21 these are just examples, but I'm thinking, you know,
22 if they could secrete it in clothing, well, that may
23 be fair game. I mean, what I'm getting at is, if
24 there was this Get Shorty -- Get Short -- sorry,
25 that's the wrong -- Get Smart, thank you. I'm now

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1 showing my generation. If there was a Get Smart
2 shoe, that would be something the Government would
3 have an interest in protecting, that may override
4 their need to bring it out in cross-examination. But
5 in terms of the size, the shape of these devices, I
6 don't think that's the problem as much as: It's this
7 color; it looks like this; you know --

8 MR. MAYNARD: Could I ask what it's
9 disguised as? I mean, is that what you're getting
10 at?

11 MR. BECK: Right. I think that would be
12 the concern: What it's disguised as. I mean, in
13 this case, I'm not sure that's a huge concern. Thank
14 you for helping me out on that, yes. But if it's
15 disguised as X, I think that's where the law
16 enforcement privilege comes in, to keep that out of
17 the case.

18 THE COURT: All right. Anything else you
19 want to say on your motion then, Mr. Beck?

20 MR. BECK: No, Your Honor.

21 THE COURT: All right. So if I understand
22 what the Government is saying that they want to keep
23 out will be the portals: Any sort of questioning
24 about what goes in the portals, and what the portals
25 look like. The shape and size are fair game. If --

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1 any questions about how it's disguised would be okay.
2 Now, what I understand that would permit the
3 defendants to do is, for example, Ms. Sirignano, I
4 guess, had a picture of it. She could show it to the
5 witness and say: Is that what it looked like? And
6 that would be a yes-no answer. But that would be
7 okay. Am I understanding correctly, Mr. Beck?

8 MR. BECK: No, I don't think so.

9 THE COURT: No.

10 MR. BECK: So the way the device was maybe
11 smuggled in or secreted is not okay.

12 THE COURT: Well, what she had a picture of
13 was just the recording device. I don't think she has
14 a picture of how it was secreted.

15 MR. BECK: Right.

16 THE COURT: But whatever this device was,
17 she thinks she has figured out what you've told them
18 a lot, so they have a picture from 2007 or 2008, or
19 something, if they showed that picture, would that be
20 a problem?

21 MR. BECK: Yes, I think it would be.

22 THE COURT: Because that falls under what?

23 MR. BECK: That falls under the law
24 enforcement privilege -- the law enforcement
25 sensitive privilege. I know what that device --

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1 THE COURT: Why does that not come under
2 the shape, which you said, I thought, was okay,
3 rather than Mr. Maynard's question of it being: How
4 is it disguised?

5 MR. BECK: I think -- I think that's a
6 good -- so I think that picture is a good example.
7 That picture may be law enforcement sensitive, and so
8 we don't want to bring that into the courtroom. I
9 mean, we can talk about -- you know, liken this to
10 classified information. There may be classified
11 information out there in the public sphere, but we
12 can't talk about that; we can't bring it in, even if
13 it's out there. So that picture may be law
14 enforcement sensitive. And so I would ask the Court
15 to tread lightly on even going this far. But if we
16 ask: Is that the device used, especially the length,
17 said no; when we ask what are the differences, that's
18 what concerns the Government, is the specific
19 aesthetics of these devices.

20 Now, if we look at that device or that
21 picture, and we say: Is it about that big, I still
22 think that's going too far. I still think -- I think
23 what is okay is to say, just as Your Honor did, is it
24 about the size of a fist? Is it -- you know, there
25 is no -- I don't see that there is probative value to

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1 getting into: Does it look like this picture, and
2 what are the specific differences? I don't see there
3 is probative value: Does it look like this picture?
4 There is probative value to: Does it have an on-off
5 switch? Is it about as big as your fist? Is it
6 about as big as your finger? Is it about as big as a
7 car battery? Can you rewind the device? Those
8 questions are probative of issues in the case.

9 But whether it looks like the picture, and
10 what are the differences, are not probative. And to
11 the extent they are, the law enforcement sensitive
12 privilege overrides the introduction of that evidence
13 in the trial.

14 THE COURT: You had -- in your motion you
15 talked about sensitive government recording devices
16 or programs. Is there something in addition to
17 programs that you're trying to sweep in other than
18 just the recording devices here?

19 MR. BECK: The programs would be the ways
20 in which devices are secreted or installed or
21 something like that. So the shoe that I was giving
22 the example of; obviously, the whole shoe -- I mean,
23 I don't know.

24 THE COURT: But the word "programs" relates
25 still to this recording device?

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1 MR. BECK: Right. So when we talk about --

2 THE COURT: There is not another program
3 out there we're talking about?

4 MR. BECK: Right. When we talk about means
5 and methods of law enforcement being protected, the
6 mean would be the device; the method would be how
7 it's secreted. So the programs likens to the method.

8 So I understand that the defense would like
9 to bring out that STIU brought them in in a ruse, or
10 through the trades or something like that. And I
11 think that's fair game. But, when we talk about how
12 the device was -- as I said, if it's like a shoe,
13 that would be the program, the way in which it may be
14 secreted or it may not.

15 THE COURT: All right. Anything else,
16 then, on your motion, Mr. Beck?

17 MR. BECK: Not right now, Your Honor.

18 THE COURT: Well, so I -- let me see if I
19 can state again more accurately what the Government's
20 position is: There would be no questioning about the
21 portal or what goes into the portal, what devices are
22 used in the portal, or what it would look like. And
23 then as far as this category of disguises, we could
24 talk generally about shape and size. So you can
25 probe there, using somewhat general language. The

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1 technique of taking Ms. Sirignano's picture and
2 showing it both to the jury and to the defendant, or
3 having the defendant take, on butcher block paper and
4 draw it or something like that, that sort of
5 specificity would not be allowed.

6 So I think that's the Government's
7 limitations that they're seeking here.

8 Mr. Adams?

9 MR. ADAMS: Thank you, Your Honor.

10 THE COURT: Did I capture that right, Mr.
11 Beck? Was that a better try?

12 MR. BECK: You did, Your Honor.

13 THE COURT: All right. Mr. Adams.

14 MR. ADAMS: Judge, I'm not so familiar with
15 the law enforcement privilege and the argument that's
16 being made there. This is not a terrorism case.
17 This is not one where we have other issues at play.

18 We're not operating in a SCIF. We've found online --

19 THE COURT: I think the Government's
20 position, though, is, and correct me if I'm wrong,
21 Mr. Beck is, from last week, is that this is not --
22 they're not trying to suggest this is a terrorism
23 case, but they use these recording devices
24 internationally. And so they don't want it disclosed
25 in New Mexico, because they use this throughout the

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1 world in terrorism cases.

2 MR. ADAMS: That's fine. And we found
3 online -- Ms. Sirignano has the EAGLE up on her
4 computer. Mr. Lowry has the HAWK up on his, through
5 Google searches. So it's fair game. I mean, what
6 they view as privileged -- they're making the choice
7 to introduce this evidence. We have Sixth Amendment
8 rights to fully confront -- not partially confront --
9 and they can classify it as a rabbit hole all they
10 want -- but to fully confront the witness and a right
11 to present a full defense. If they're so concerned
12 about the sensitive nature of the devices, they don't
13 have to use that evidence. They're making a choice
14 to put it in play in this courtroom.

15 I'm not going to agree -- I'll obviously
16 follow whatever ruling you have -- but I'm not going
17 to agree a centimeter of an inch to give up any
18 constitutional right and make any sort of agreement.

19 At issue for us, for Mr. Garcia, and for
20 many of these men, is absolutely, the Government's
21 ability and their agents' ability to manipulate the
22 collection of evidence that's presented in this
23 courtroom. When they can turn on and off the
24 devices. And the Government wants, I believe -- and
25 I think they want to hide behind this notion of:

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1 Well, keep them away from talking about the battery
2 life, keep them away from this, so the insinuation at
3 the end of the case is we did the best we could do
4 with what we had.

5 THE COURT: I think the battery life is
6 back on. I think, as Mr. Beck talked, it was
7 important to both sides to talk about the battery
8 life. So I don't think that's off the table. Am I
9 correct on that, Mr. Beck, that you decided the
10 battery life stays on the table?

11 MR. BECK: That's right, Your Honor.

12 MR. ADAMS: Then my position is it's all on
13 the table; not just so we can give them a hard time,
14 that's not the point at all. But for us to be able
15 to complete the fullest, broadest, most powerful
16 defense we can present as to their witnesses' ability
17 to manipulate the evidence, we can't agree to any
18 limitation on this.

19 Obviously, again, you can limit us, and
20 we'll follow that ruling. But I don't think I'm in a
21 position to agree to any limitation on the
22 cross-examination related to these devices.

23 THE COURT: All right. Thank you, Mr.
24 Adams.

25 MR. ADAMS: Thank you.

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1 THE COURT: Anyone else want to speak on
 2 the Government's request for limitations here?

3 All right. Anything further, Mr. Beck, on
 4 that?

5 MR. BECK: Well, I mean -- I think,
 6 obviously, we're constrained to evidentiary rules,
 7 the rules of evidence here. And, obviously, they
 8 take into consideration constitutional rights. So,
 9 as I said, the information they're seeking isn't
 10 relevant to an issue in this case -- and so it would
 11 be not admissible under 402 -- I mean, I understand
 12 Mr. Adams' argument that they want to fully explore
 13 manipulation of the evidence. And as I said, they
 14 can. They can ask whether they can rewind, go over
 15 all those things that were explained in court the
 16 other day.

17 The dimensions of the device don't have to
 18 do with any manipulation of the data. And the
 19 aesthetics of the device don't have to do with any
 20 manipulation of the data, which is why I think those
 21 two areas are important, so --

22 THE COURT: Well, I'm going to grant -- did
 23 you have something, Ms. Sirignano?

24 MS. SIRIGNANO: Just a quick footnote.

25 I think the idea that this thing is so

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1 secretive is just complete nonsense, Judge. Even you
2 can pull up this stuff on the internet. They gave
3 this to their cooperator.

4 THE COURT: Why did you say it that way?

5 MS. SIRIGNANO: It's that easy. It's that
6 easy. You know, the fact that this stuff --

7 THE COURT: I feel slighted.

8 MS. SIRIGNANO: I'm sorry, Judge.

9 THE COURT: I have an iPhone.

10 MS. SIRIGNANO: It wasn't meant that way.

11 THE COURT: I'm in the 21st Century.

12 MS. SIRIGNANO: You've got your iPhone, go
13 right ahead, type in the HAWK device. It's right
14 there. Not one picture says law enforcement
15 sensitive. It's proprietary, sure. But -- and the
16 fact that the FBI uses proprietary equipment is,
17 again, not a secret. And so I fully intend to get an
18 exhibit with the HAWK and the EAGLE and the other one
19 that was used, and put it in evidence. I just think
20 that, you know, we go into this argument that it's
21 law enforcement sensitive, national security
22 privilege, which really hasn't been proven in any
23 stretch of the imagination. They gave it to these
24 informants. They're given to informants all over the
25 country, every division of the FBI, thousands of

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1 people, informants, cooperators, know how these
2 devices are being used by the FBI, and the fact that
3 our clients can't delve into that is utterly
4 ridiculous.

5 If they want to not give up this device or
6 the way that this evidence was recorded, then they
7 can choose whether or not to use it, Your Honor. I
8 mean, that's the give and take. Either they let us
9 delve into it or they don't use it. And that would
10 just be my little footnote.

11 Thank you, Your Honor.

12 THE COURT: Thank you Ms. Sirignano.

13 Mr. Beck.

14 MR. BECK: I'll respond to that by saying
15 the FBI and the Government considers this extremely
16 sensitive. And that will be evidenced later today
17 when we talk about the request for the viewing of
18 this device that we discussed when these devices were
19 presented two weeks ago by Special Agent Williamson
20 and the conversations that I've had with the FBI
21 about that. So the Government and the FBI considers
22 these very, very sensitive. And that's why the law
23 enforcement sensitive privilege exists.

24 So the remedy isn't that the United States
25 can put in this evidence or not use the devices. The

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1 remedy is that the defendants have to overcome the
2 law enforcement sensitive privilege to show that they
3 are entitled to these devices. And at that point,
4 the United States decides how it wants to proceed.
5 But I think the Court's ruling on this motion is
6 correct and is sound. So I'll sit down.

7 THE COURT: All right. Thank you, Mr.
8 Beck.

9 Well, I am going to grant the motion in
10 part. We don't have a lot that's off the table.
11 There is a lot about the device that is fair game and
12 can be disclosed. But I do think in the particular
13 areas the Government has established their privilege.
14 And so I will honor it, and not see it's been
15 overcome. If this is one of the ones -- this
16 scenario that you want me to spend more time with,
17 I'd be glad to move it to the top of the list.
18 Otherwise, for purposes of trial there will be no
19 testimony elicited about the portals or the devices
20 that go into the portals. No pictures will be shown
21 to the witnesses: Was this the device? And we'll
22 not ask the witnesses to draw on butcher block paper
23 the exact size or shape. Size or shape can be asked,
24 and answered generally. As far as how they are
25 disguised, packaging, anything like that, that will

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1 be off limits as well, any sort of program the
2 Government has for disguising or secreting these will
3 be off limits.

4 Again, if defendants can't live with that,
5 or think that's cutting it too close, you want to
6 move this one up so I take a harder look at it, I'd
7 be glad to do that. But that will be our ruling for
8 trial.

9 What I would like to do now is go into a --
10 I think Ms. Wild -- Ms. Wild, are you on the phone?
11 She was going to be gone at a meeting for about an
12 hour. She may not be on the phone. I'd like to go
13 into a true pretrial conference at this point,
14 because I think what that will do is it will begin to
15 kick us into some of the issues about exhibits,
16 exhibit lists, and things like that. So I'd like to
17 pull our calendars out. I'd like to get my list of
18 things that I go over in every trial. Many of you in
19 the room have had trials with me, so you're going to
20 be familiar with how I do a pretrial conference.

21 And then what I'd like to do is go through
22 that in part. I'm sort of beginning to pick up
23 Document 1525. And then, after we go through that in
24 part, it will certainly not be in whole, but in part,
25 a true pretrial conference. And I've thought about

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1 it overnight about how to tackle these bad acts. And
2 what I was going to propose is that we pick up,
3 instead of Mr. Troup's, we pick up Mr. Garcia's
4 motion on bad acts. And I'm not particular as to
5 which one we do, but we pick that one up, and then we
6 begin to plow through t. We'll just take them one at
7 a time, we argue them out, and I call balls and
8 strikes, and see how it goes. I mean, if it's going
9 to take the rest of our week, then we may want to
10 start looking at some other motions or some other
11 issues. If it moves along, at some point people may
12 say, We get it, Judge, we think we can work out the
13 rest. I don't know, but it seems to me that that's
14 the best thing to have a judge just start making
15 balls and strikes on what's been -- after a while,
16 y'all can tell me whether that's useful or not, and
17 whether we just need to keep going, or we need -- I
18 have to pull back.

19 So I'm going to get out my folder. I
20 brought it to the bench yesterday. Mr. Hammond,
21 would you grab my calendar out of my briefcase. I
22 brought it yesterday to the bench, but I didn't bring
23 it today.

24 Ms. Wild, are you there? Ms. Wild?

25 All right. Let's, first of all, talk about

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1 the length of the trial. I think y'all talked to
2 Ms. Wild about this. We've also talked about it in
3 hearings that we had. But let's just make sure
4 everybody is on the same page. What I had been
5 understanding that Ms. Wild has been using, and y'all
6 have been using with her, is that this trial would
7 start on January 29, and it would go six to eight
8 weeks, which would mean that it would be the last
9 week of January, 2, 3, 4, 5, 6. So that people were
10 not anticipating the trial being over before the end
11 of business on March 9. And that they thought it
12 could last as late as March 23.

13 Is that, A, still the expectations of the
14 parties, or is there any miscommunication or
15 misunderstanding on this? And do I need to be using
16 any sort of different figure? From the Government's
17 standpoint, is that still an accurate estimate of how
18 long the trial would last? Is there anything more
19 accurate that we can use at the present time?

20 MS. ARMIJO: I think we used that number,
21 and I think that's the number that we used
22 approximately in the juror questionnaire, four to six
23 weeks, and we stay with that.

24 THE COURT: So on the jury questionnaire
25 says four to six?

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1 MS. ARMIJO: I thought the jury
2 questionnaire said four to six. But I hear some
3 people saying differently. If Ryan was here, he
4 would know, because he's the one that worked with us
5 on it. But I think we could say six weeks.

6 THE COURT: Let me ask Ms. Standridge if
7 she can get ahold of the -- it doesn't have to be an
8 actual questionnaire, but just what went out to the
9 jurors.

10 Has the rolling production started yet?

11 MS. HARBOUR-VALDEZ: No, Your Honor. Next
12 week or later this week, the 20th, I believe. It's
13 December 20 is the first distribution.

14 THE COURT: So that's tomorrow. You might
15 see if Jury Services, since they're about to give
16 them to the parties, if they have one if they could
17 just look at that and tell us what it says there.

18 MS. FOX-YOUNG: Your Honor, I'm looking
19 at -- I don't obviously know what went out, but the
20 final draft did say approximately six weeks as far as
21 I can tell.

22 THE COURT: Approximately six weeks.

23 (A discussion was held off the record.)

24 THE COURT: Well, does anybody have any
25 refinement? If it says six weeks, is that what

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1 everybody is anticipating, which would put it at the
2 end of business on March 9? Is that still, from the
3 Government's standpoint, does that look like a good
4 estimate of six weeks?

5 MS. ARMIJO: Yes.

6 THE COURT: Ms. Sirignano?

7 MS. SIRIGNANO: Judge, I just can't
8 reconcile that in my head with the number of
9 witnesses that the Government has put on their expert
10 list and our expert list. And so we had been
11 anticipating eight weeks. I just --

12 THE COURT: Who just got on the phone? Is
13 that Ms. Wild?

14 MR. CASTLE: No, it's Mr. Castle and
15 Mr. Burke.

16 THE COURT: All right.

17 MS. SIRIGNANO: Those are just my thoughts.
18 I don't see how this could wrap up in six weeks,
19 quite honestly, with what we've got before us today.

20 THE COURT: Well, we need to be honest with
21 the jurors. If we sent out an estimate of six weeks,
22 if that's what's on that form, it's going to get done
23 in six weeks. So your reconciliation should have
24 come earlier, because I signed off on what y'all
25 agreed on. So if it says six weeks, then we're going

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1 to be done by March 9, because that's what went out
2 there. Anybody else have any comments on the length?

3 All right. As far as I understand -- and
4 people can correct me if I'm wrong -- we're doing
5 this trial in Las Cruces. We are doing it in this
6 courtroom, unless Ms. Standridge tells me it's some
7 other courtroom. But I understand it to be here. So
8 we will talk about technology. We'll talk about what
9 the needs of the parties are. But plan on it being
10 in this courtroom unless we're told otherwise, and
11 I'll keep you posted on that.

12 So the first question: Do you wish to
13 have, at the end of the case, do you want to have
14 closings before or after instructions, Ms. Armijo?

15 MS. ARMIJO: After.

16 THE COURT: Closings after.

17 So the five defendants that are appearing
18 in the first case, is everybody comfortable with
19 closings being after instructions? Anybody have any
20 problem with that? Most people like to get the judge
21 out of the way so they can speak to the jury.

22 All right. So not hearing any objections,
23 we will have closings after the Court instructs the
24 jury.

25 Let's begin to dip our toe into

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1 preliminary -- to jury instructions. Let me ask the
2 Government first, because y'all will probably -- I'll
3 be putting a number of the burdens on jury
4 instructions on the Government. Are all the counts,
5 or all the crimes that are charged in the first
6 trial, are those ones for which the Tenth Circuit has
7 pattern jury instructions, or does not have pattern
8 instructions?

9 MR. CASTELLANO: They don't have all of the
10 instructions for VICAR. There are some RICO
11 instructions. I think they talk about enterprise.
12 But it's not a complete set in the Tenth Circuit.

13 THE COURT: All right. So I'm going to
14 start setting some deadlines here. And I'll work
15 with you to make them doable. But the first thing
16 I'd like to do is to start working on a preliminary
17 instruction so that the jury has a preliminary
18 instruction that contains the elements of the
19 offenses that the Government is seeking to prosecute.

20 So -- and I'm flexible on these deadlines.
21 But here's the first deadline I'd like to have is,
22 I'd like to put the burden on the Government to get
23 out not a full set of jury instructions, but --
24 unless they want to -- but get the elements of the
25 offense. So this is something that not every judge

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1 requires, but I require it, and it seems like every
2 time I require it, nobody ever does it. So I'd like
3 in this trial that we do it. So I must communicate
4 exactly what I'm looking for here. But I'm looking
5 for a document that the Government will produce and
6 file -- we'll talk about all that in a moment -- that
7 says this: These are the elements of the offense
8 that we have to prove beyond a reasonable doubt. And
9 that's all it is. It's not dressed up with all the
10 bells and whistles of defenses and definitions and
11 those sort of things. It's just: Here are the
12 elements of what is going to be proved. And since
13 there might be some disagreement about what those
14 elements are, I'd like to start getting those issues
15 out earlier rather than later.

16 So, with that in mind, I would like to
17 have -- and if people want to back these up some,
18 that would be fine with the Court -- let me look at
19 my calendar and propose some deadlines. Then we can
20 see how y'all react to these.

21 All right. Here is my proposal. And if
22 you want to do something different, I'm game. But
23 I'm trying to think of what my needs are, and then
24 what -- how y'all work. I would propose that the
25 Government file this document and call it "Elements

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1 of the Offenses the Government has to Prove" for each
2 of the -- I guess, it's each of the counts. If the
3 counts are duplicative, in other words, it's the
4 same -- well, why don't we do it for each count. And
5 if there is different defendants, then identify it,
6 but it be comprehensive in the sense that I will be
7 giving an instruction. Even if I'm repeating myself,
8 I'd rather do that, and then figure out how to reduce
9 the redundancy. But you produce this document by the
10 end of business on Monday the 22nd. Defendants look
11 at it on the 23rd. Discuss it, see how much you
12 agree with, what you disagree with, if any. By the
13 end of business on the 24th, then, the Government
14 file this document. So on the 22nd you're sending it
15 to the defendants. And then discussion occur on the
16 22nd and 23rd. On the 24th, the Government then file
17 a document again called "Elements of the Offenses the
18 Government has to Prove Beyond A Reasonable Doubt" by
19 the end of business that day indicating where the
20 defendants agree with you and where they disagree
21 with you. And then you file it and you're done.

22 The defendants then need to also file by
23 the end of business that day what you disagree with.
24 So you can tell me briefly what the disagreement is,
25 or you can tell me you need this word changed or

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1 something like that. Make it real clear in both
2 submissions what you agree on, so we don't spend a
3 lot of time with those elements, and that I focus on
4 where the disagreements are. And then that will give
5 me a couple of days to work with what you have and
6 try to generate for you before I -- before end of
7 business on the 26th. So that will give me a couple
8 of days to try to generate a preliminary instruction
9 for you.

10 You do not need to prepare a preliminary
11 instruction. All I need from the parties is to tell
12 me -- give me some input on the elements of the
13 offense. And I will prepare the preliminary
14 instruction so you don't need to prepare that.

15 How about those deadlines, requirements for
16 the Government? Does it work for you, Ms. Armijo?

17 MS. ARMIJO: Yes, Your Honor. I believe
18 our scheduling order has for both parties to submit
19 jury instructions on January 12 currently. So that
20 will be after that deadline. So it should be easy.

21 THE COURT: All right. Well, I forgot
22 about the scheduling order. Do we already have the
23 jury instructions plugged in there then?

24 MS. ARMIJO: January 12.

25 THE COURT: For both sides. All right.

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1 Let me skip that, then. I'll just look at the jury
2 instructions. You don't need to do that at all. So
3 I'll pull that out and prepare a preliminary
4 instruction and try to get it as soon as possible.
5 So I guess what -- I guess, if I were the defendants,
6 I'd take a hard look at what the preliminary
7 instructions of the plaintiffs or the Government is.
8 And then maybe be alerting to me, because I'll be
9 then putting the preliminary instruction together.
10 So I'll just look at your instructions to get my cue
11 as to what the elements of the offense are.

12 Ms. Sirignano.

13 MS. SIRIGNANO: Sorry, Judge. I'm not
14 tracking. So we don't have to worry about the
15 December 22nd deadline.

16 THE COURT: Well, January 22nd.

17 MS. SIRIGNANO: January 22nd.

18 THE COURT: Yeah, don't worry about that.
19 If y'all are going to give me jury instructions as
20 early as the 12th, then I'll just work with those.

21 MS. SIRIGNANO: Just jury instructions by
22 both parties submitted on January 12.

23 THE COURT: Well, that's what Ms. Armijo
24 tells me the scheduling order is. I don't have it in
25 front of me. So if that's what it says, let's not

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1 start untangling that. Y'all worked hard on that,
2 and I don't want to start untangling that. I'd
3 forgotten about that.

4 MS. ARMIJO: There are several things due
5 January 12th. That's one of them. As to jury
6 instructions, the 12th is the deadline for filing it,
7 and January 19th is the objections to the jury
8 instructions. So the Court should have, well in
9 advance of January 22nd, both parties' submitted and
10 objections to jury instructions.

11 THE COURT: Okay. All right. So we'll
12 just deal with that. So forget the elements of the
13 offense. I'll just take that.

14 Notetaking. I generally give an
15 instruction in the preliminary instruction. Have I
16 gone over this at all? Did we do this at all? I
17 don't want to be wasting everybody's time. So I
18 generally put in my preliminary instruction that the
19 jury can take notes. There are cautionary
20 instructions about not getting lost in notetaking,
21 leave your notes in the jury room at night, you know,
22 the sort of standard things you tell them about
23 notetaking. But I generally allow, bottom line is,
24 jurors to take notes with cautionary instructions.

25 Is that acceptable to the Government, Ms.

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1 Armijo?

2 MS. ARMIJO: Yes, Your Honor.

3 THE COURT: Any defendant have any
4 objection to me allowing the jury to take notes with
5 the cautionary instruction? Which you'll see, I'll
6 send you the preliminary instruction. Anybody have
7 any problem with that? Not hearing any, then I will
8 include that.

9 Same with questions by jurors. I typically
10 do not, as you've probably gotten a feel, I don't
11 usually ask questions of witnesses. I don't inject
12 myself into the trial. So I don't allow jurors to
13 stand in the jury box and ask questions either. But
14 if they wish to write out questions, we'll tell them
15 those are extraordinary moments. They write it out.
16 It will be picked up by the courtroom deputy, handed
17 to me. I look at it. What I typically do is show it
18 to you. If you want to work it in, then we'll work
19 it in. And then I'll show it to you. If you want me
20 to ask it, I'll ask it -- Ms. Wild is on the phone?
21 Okay. So we'll do it that way, but at least allow
22 them to write out questions.

23 Two weeks ago, I had a jury, boy, they
24 asked a lot of questions. But some were useful and
25 some weren't. Anybody have any problem with that,

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1 Ms. Armijo?

2 MS. ARMIJO: No, Your Honor.

3 THE COURT: Any of the defendants have any
4 problems with me including that paragraph in my
5 preliminary instructions? All right. So I will
6 include that in my preliminary instructions.

7 Let me ask -- I assume before we did all
8 our work, so y'all just have to remind me, we agreed
9 on how many alternates we were going to have for
10 trial, and I remember it being four. So we're
11 picking a jury of 16? Everybody is nodding their
12 head. So I think we've already passed that bridge.

13 And the next question -- let's take it up
14 after lunch -- do we want to keep all four under
15 charge when we send the jury back to deliberate? One
16 under charge? Two? Three? Let them all go? Let me
17 know what y'all think about that. But why don't we
18 take our lunch break at this time.

19 All right. See you in about an hour.

20 (The Court stood in recess.)

21 THE COURT: All right. Go back on the
22 record here, get started. Looks like every client
23 has a counsel -- defendant has a counsel. Look
24 around, make sure that's the case.

25 All right. A couple of things.

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1 Mr. Hammond, my law clerk, looked at VICAR jury
2 instructions. Interestingly enough, he said the
3 Second and the Fourth didn't have any, but the Fifth
4 does. I have not used the VICAR jury instructions
5 from the Fifth. But my experience with the Fifth has
6 been that they are a good set of jury instructions.
7 The Tenth used them in many ways as a model for
8 theirs. And I use their -- on the civil side, I
9 think their civil jury instructions for 1983 actions
10 and stuff is pretty good. So I point that out. I
11 don't know if y'all had already started that. But
12 the Fifth does have a set. It's a 2.78, and it's
13 pages 382 through 387. So maybe that will assist you
14 on jury instructions, if you haven't already done
15 them.

16 We did look during the break also at the
17 summons for jury service that went out, the special
18 jury questionnaire. Questionnaire itself, which
19 y'all agreed on, says on page 18, question number 76,
20 it says, "The trial in this case is expected to last
21 approximately six weeks in Las Cruces, New Mexico.
22 Is there anything about the approximate length of
23 time that would not allow you to serve on this jury?"
24 The cover letter, I think originally had four to six
25 weeks. And I think we changed that. So the trial is

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1 expected to last approximately six to eight weeks.
2 So the cover letter says six to eight weeks. The
3 jury questionnaire itself says six weeks. So I guess
4 we got a little bit of time we're in play on.

5 All right. I think the question that I
6 left on the table was what your thinking was on
7 alternates? Do you want to keep all four under
8 charge? None under charge? Or some number in
9 between one and four under charge? Ms. Armijo?

10 MS. ARMIJO: We would like to keep all four
11 under charge.

12 THE COURT: How do the defendants feel
13 about that? Anybody have any views on it? Is that
14 fine? Just keep all four under charge? Keep them at
15 a secret, undisclosed location somewhere in the
16 building during deliberations? All right. We'll
17 plan on keeping them under charge. So when the jury
18 goes back to deliberate, I'll give the alternates
19 some instructions, and we'll be prepared to place
20 them somewhere comfortably within the building.

21 Start time. I'll certainly discuss this
22 with you, but I think just because of logistics, it's
23 hard to do much more than sort of a regular time
24 schedule. I have in the past done some trials as a
25 lawyer out on the west coast and stuff, that I

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1 thought worked a little bit. But I'm not sure that
2 we can really do it because of the logistics of this,
3 where we'd start real early, and not have any lunch
4 break. Have a couple of short snack breaks, and
5 maybe break a little bit early in the afternoon, so
6 that you can prepare for witnesses the next day. The
7 problem with that schedule here, I'm not sure we can
8 really do it because I'm going to talk to the
9 marshals about seeing if we can start the trial at
10 8:30 in the morning, moving it up 30 minutes. I
11 don't know if that's going to be possible given the
12 logistics of moving people in. And that way, still
13 breaking at 5:30. But if we're moving the trial
14 along, maybe we can get out of here a little bit
15 earlier, so the men can get -- in the first trial --
16 get the men back a little bit earlier in the day and
17 the marshals out of here. But I'd sort of entertain
18 a little bit of an alternate schedule, but I'm not
19 sure it really is feasible here. Otherwise, we'll
20 probably start as early as I can get the marshals to
21 get them in here. Go to 5:00, 5:30, take a
22 traditional lunch break, so you get lunch. And I may
23 break at 11:45. I don't know if I can get some work
24 done down here on some other cases, up in
25 Albuquerque, I do a lot of reentry cases or something

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1 at 11:45, maybe some initial scheduling conferences
2 in some civil cases. Down here, most of my docket is
3 up there, so I don't know. Maybe I can do some
4 things by phone, that way you get a little bit more
5 time at lunch. And then everybody try to be back.

6 Any thoughts on that, Ms. Armijo? I'm
7 certainly willing to discuss and take back to Ms.
8 Wild and the marshals. Are you game for doing
9 something different, or stick with the traditional
10 schedule?

11 MS. ARMIJO: We would like to stick with
12 the traditional schedule.

13 THE COURT: You like lunch? Everybody has
14 grown fond of lunch.

15 All right. Mr. Adams, traditional?

16 MR. ADAMS: I'm also apparently very fond
17 of lunch and breakfast and dinner. I like them all.

18 THE COURT: I've been reading your
19 vouchers, figuring out where to eat around here.

20 MR. ADAMS: I found all the spots. I'm
21 going to do a book when I leave. I do have one
22 request. And I know I'm -- that a lot of people
23 drive down from afar, and I know you're coming down.
24 And I think all of us have an interest once the trial
25 starts, to get it over as quickly as we can, with a

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1 round of acquittals for everybody in as short order
2 as we can.

3 I also am looking at flights. And I have
4 basically two options to get home. And I have a son
5 who is 8, who likes his mom a lot more than he likes
6 me, but I'd like to keep connected with him. And I
7 don't know if it might be -- so there is no real way
8 for me to do that on Saturday morning at the 6:00
9 flight, and then get back here Sunday. I was
10 wondering, if it's not too disruptive, I -- think you
11 like to go all five days, and I'm not trying to talk
12 you out of who you are as a person, but if maybe
13 every other Friday -- if you would consider possibly
14 breaking at noon every other Friday, that would be, I
15 think, certainly a huge help at my house in South
16 Carolina, and I suspect in many other houses around.

17 And I would also point out it doesn't fall
18 as the second week. But there is a President's Day
19 weekend in there, where I think we're off on a
20 Monday. I have to be -- I have a professional
21 obligation to be in New Orleans on Saturday morning
22 at 8:00 a.m. So realistically the flight, I could
23 get an afternoon flight to El Paso, and get in around
24 midnight. But if that might be a day that you would
25 consider breaking a little early before the long

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1 weekend. I just offer those up. If you can work any
2 accommodations, it would be appreciated by Helen
3 Adams at 843 -- no. But thank you.

4 THE COURT: Well, I guess, you know -- I
5 guess what I'm thinking is that, you know, for
6 particularly the people that are going to be flying,
7 I personally don't care if you stay -- you know, on a
8 Friday afternoon or something, if you want to get out
9 of here, just get out of here. You may feel like you
10 don't want to get out of here with the jury watching
11 you or something like that, and I understand that. I
12 probably am going to push everybody. I think I
13 indicated earlier that these things don't just get
14 any better with age. This is not wine. This is a
15 trial. So I'll probably push myself and push
16 everybody hard. I'm probably not going to go back on
17 Friday night. That's just too hard. I'm going to go
18 back tomorrow night because I've just got to be in
19 the office 8:30 on Thursday morning. But I'm going
20 to try to pace myself, too. So I'm not going to
21 break early. I'm not going to go back up to
22 Albuquerque until Saturday morning.

23 So I hear what you're saying. But the
24 thing that would probably work in your case, Ms.
25 Sirignano; if you want to get out of here, it's fine

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1 with me, and that way, you'll have counsel here, and
2 you know, maybe work with the Government to make sure
3 nothing is coming up that afternoon that you need be
4 here for. But do plan on being here. We're going to
5 push ahead. We're going to get it done. And so put
6 everybody on time schedule, on the defendants' side,
7 everybody want a traditional schedule? That means
8 everybody will break for lunch, all that. We'll work
9 regular hours. Mr. Jewkes, everybody on board?

10 Okay. So we'll plan on a regular schedule.

11 MR. JEWKES: That would be my choice.

12 THE COURT: Okay. We'll do a traditional
13 schedule. And you know, Mr. Adams, you work on
14 Ms. Wild.

15 MR. ADAMS: Judge, I'm really not
16 complaining. I thought you would probably want to be
17 a 9:00 to 5:30 p.m. person every day. I just thought
18 I would offer it, if there was a little bit of
19 flexibility.

20 THE COURT: Well, talk to Ms. Wild.

21 MR. ADAMS: We'll live with whatever you
22 tell us to do. We'll be happy to be here.

23 THE COURT: Okay. I should have put on the
24 record that Mr. Burke, Mr. Castle, are not in the
25 courtroom. Are they on the phone, Mr. Cooper?

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1 MR. COOPER: Your Honor, I don't know,
2 given their flights, they might not be.

3 THE COURT: Well, they're not in the
4 courtroom. I'll make that record. I don't hear them
5 on the phone.

6 All right. So unless y'all tell me
7 otherwise, we'll run a traditional schedule. And
8 Ms. Wild, are you there? Ms. Wild? All right.

9 Well, I want to put on her list for her to discuss
10 with the marshals to see if we can get the defendants
11 in here at 8:30, see if we can try to get started at
12 8:30, and get a little bit longer day or at least
13 push the day up a little bit.

14 All right. Let's talk about openings. How
15 long does the Government expect its opening to last?

16 MS. ARMIJO: An hour.

17 THE COURT: All right. How do the
18 defendants anticipate doing their opening? I'm going
19 to ask some questions. If for trial strategy you
20 don't want to answer a question, you're welcome to
21 tell me you don't want to answer. But if you do know
22 that you're going to make your opening statement at
23 the beginning of trial, that would help me in
24 planning purposes, and also writing the preliminary
25 instruction. And do you intend -- if you intend to

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1 do it at the beginning, or do you intend to each
2 defendant make an opening statement? And how does
3 that work.

4 So let me ask the first question. The five
5 people going to trial on January 29, is there anybody
6 here that's not wanting to make an opening statement
7 at the beginning of the trial, or either that, or
8 doesn't want to tell me, one or the other? All
9 right. So I'm going to assume for writing my
10 preliminary instruction that all defendants will be
11 making an opening statement on the first day, or
12 whenever we have openings, and you'll be doing it at
13 the beginning of the trial.

14 So let me just ask, probably ought to break
15 these down now. Mr. Baca, either you or Mr. Lowry or
16 Ms. Duncan, how long do you think your opening will
17 last?

18 MR. LOWRY: Your Honor, we anticipate
19 roughly an hour as well.

20 THE COURT: All right. And Mr. Maynard,
21 Ms. Bhalla, how long did you think your opening will
22 last?

23 MR. MAYNARD: Probably 20 or 30 minutes.

24 THE COURT: Okay. Mr. Adams, Ms.
25 Sirignano, how long do you think yours will last?

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1 MR. ADAMS: One hour.

2 THE COURT: All right. Ms. Fox-Young, how
3 long does Mr. Perez' last?

4 MS. FOX-YOUNG: Without speaking for Mr.
5 Villa, I would estimate at least a half an hour, 30,
6 45 minutes.

7 THE COURT: And Mr. Jewkes, Ms. Jacks, how
8 long do you think yours will last?

9 MR. JEWKES: Your Honor, Ms. Jacks and I
10 have discussed this, and we don't want to sound like
11 cheapskates, but 20 minutes.

12 THE COURT: Well, my dad was an old country
13 preacher. He said he never saved anybody after 20
14 minutes. So that's a good number.

15 MR. JEWKES: I understand, Your Honor.

16 MS. FOX-YOUNG: Your Honor, just backing up
17 a bit. And if the Court doesn't want to go through
18 this now, that's fine. But do you have an estimate
19 how long you think jury selection will take?

20 THE COURT: I was thinking about what my
21 next question was going to be. Whether I wanted to
22 go into voir dire or I wanted to go into closings.
23 Why don't I do this: Since I've gotten openings,
24 let's talk about closings and then we'll talk about
25 voir dire. Because I think I need to share

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1 information with you for those people that haven't
2 had a trial with me, so we can have an informed
3 discussion here.

4 So how long does the Government think its
5 closing will last?

6 MS. ARMIJO: Including rebuttal,
7 two-and-a-half hours.

8 THE COURT: And Mr. Lowry and Ms. Duncan,
9 how long will Mr. Baca's closing last?

10 MS. DUNCAN: Your Honor, I would guess an
11 hour to an hour and a half, max.

12 THE COURT: All right. And Mr. Adams.

13 MR. ADAMS: 56 minutes and 28 seconds, Your
14 Honor.

15 THE COURT: I like answers like that.

16 All right. Ms. Fox-Young.

17 MS. FOX-YOUNG: 45 minutes.

18 THE COURT: Ms. Jacks? Mr. Jewkes?

19 MS. JACKS: I would say an hour and a half.

20 THE COURT: Mr. Maynard?

21 MR. MAYNARD: 30, 45 minutes.

22 THE COURT: All right. Let me talk about
23 voir dire, depending upon how you say those French
24 words, we have enough Texans here that probably
25 you've heard the alternative pronunciation. For

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1 those of you who have had trials with me, you
2 probably know that I probably do the most extensive
3 voir dire among my colleagues. That does not mean
4 that I'm extensive from where you're from. But you
5 probably scouted me out enough to know that I do an
6 extensive voir dire.

7 Let me talk about my philosophy as a judge.
8 You have your philosophy as a lawyer. I do think
9 jury selection is important, so I'm not one of those
10 judges that does not think it's important. I do
11 think voir dire is important. I think it's a
12 critical stage of the trial, because I want everyone
13 in the room, all the parties, to feel that when they
14 start this trial, they've got a fair and impartial
15 jury there. So I will work with you to get you a
16 fair and impartial jury. Again, you have your
17 philosophy about how to select a jury, and that's for
18 you to decide.

19 I will tell you a little bit that when I
20 was practicing, I always thought the best thing the
21 judge could do for me was to make the jurors feel
22 comfortable talking in the courtroom. Because we're
23 used to hanging around courtrooms, that's what we do
24 all the time for a living, and so we're used to
25 talking and we're used to being fairly comfortable in

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1 a courtroom. And we forget how intimidating a
2 courtroom can be for people that don't make a living
3 hanging around courtrooms. So the thing I try to do
4 is to make it a comfortable place. So you will see
5 me doing some things that are maybe not terribly
6 enlightening for what you have to do, which is to
7 exercise peremptory challenges and make for cause,
8 but what I will be doing is trying to make the jurors
9 comfortable. So that when you stand up as counsel,
10 you have probably heard the jurors speak at least
11 once, if not multiple times, had me questioning them
12 a little bit, so they're used to questioning. So
13 that the first person that has to speak to a juror is
14 not you, which I think puts you at a disadvantage,
15 but that I've kind of done that for you.

16 So I will -- I'm going to give this some
17 thought. Ms. Wild, are you on the phone now? I
18 think what we agreed to is that we'd have 60 in the
19 courtroom, and bring in waves of 20, if we didn't get
20 our 16 out of the first 60. Sixty is a big number.
21 That is a big number in the courtroom. But, of
22 course, we're picking 16.

23 Ms. Wild, are you there?

24 THE CLERK: I am, Judge.

25 THE COURT: All right. So I'm talking

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1 about the jury selection. And I think we agreed that
2 there would be 60 in the courtroom. I will do the
3 sort of typical things of -- I will prompt you
4 through -- so I will prompt you through introduction
5 of yourselves as the lawyers. I will prompt you
6 through your introduction of your clients. I will
7 prompt you through the identification of your
8 witnesses. So you will need to be ready for those
9 questions. So when they come, you know they're
10 coming, and you will then -- then you'll do it. But
11 I will prompt you through. Then I will ask some
12 general questions. I intend to ask about law
13 enforcement. Even though you have some information
14 on your jury questionnaire, I'll probably ask some
15 questions on law enforcement. I will probably ask
16 some questions about jury service.

17 I will probably ask some questions, because
18 this case has drugs, I think we probably need to find
19 out a little bit about if anybody has strong
20 reactions to drugs, substance abuse, that sort of
21 thing. Then I will probably look very closely at the
22 standard jury questionnaires that went out as well as
23 the special questionnaires, as well as the special
24 questionnaires, and see if I see some questions that
25 I can ask each one of the jurors or at least deep

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1 into the jury pool. I may not go to number 60. You
2 know, it's always number 60 that's yappiest back
3 there, you know. And you know they're not going to
4 chosen, but they're going to tell you about their
5 mother-in-law and their dog and cat and everything
6 else. I'll probably begin to, you know, quit, but I
7 don't know. I don't know, it may be that I just feel
8 like we have to exhaust this 60 and make sure we get
9 it done.

10 Now, the thing that's a little more
11 challenging for me as a judge this time is because
12 your questionnaire is so extensive that, I don't
13 know, there might not be anything for me to ask, you
14 know. So I say that because, be prepared, for those
15 of you who have tried cases with me, if I just really
16 don't have something to ask somebody because of the
17 extensive questionnaires here, and I'm not going to
18 waste everybody's time, theirs or mine or yours, by
19 asking them a bunch of makeup questions. So it's
20 really not going to be helpful. I'll try, though. I
21 will try to think of something, maybe two or three
22 questions with each one of the jurors, so that
23 they're comfortable speaking in here.

24 If the jurors know something about the
25 case, I intend not to have them pollute the jury

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1 pool, so I'll bring them up to the bench. So be
2 ready to come up to the bench fairly frequently,
3 because if anybody knows anything about the witnesses
4 or the case, we'll do that up here at the bench.
5 We'll fog the machine, and we'll do that portion of
6 the voir dire up here at the bench.

7 I'm trying to think. Is there anything
8 else I need to go over? Can you think of anything
9 else, Ms. Wild, that might be particular to me for
10 the lawyers that haven't had a trial in front of me?
11 Anything in particular about this case that you think
12 I ought to share with them that you would predict how
13 I'm going to do things.

14 THE CLERK: Typically, you don't excuse
15 jurors for cause without a party moving.

16 THE COURT: That's a good point. When we
17 get to the for cause challenges, I'm not going to be
18 freewheeling. I haven't done it with -- you know,
19 you get some of these judges that grab the
20 questionnaires and start knocking people out. I
21 didn't do that. I'm going to work with you so that I
22 don't skew the pool. And I typically will not be
23 excusing people out of the venire without somebody
24 telling me they want them out. Because you have
25 reasons, and you have probably profiles and people

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1 that you want on the jury. You've probably got
2 profiles of people you want off the jury. I'm not
3 going to try to get myself involved and do that. So
4 if you want somebody off the jury, you've got to make
5 a for cause challenge for them.

6 Can you think of anything else, Ms. Wild?

7 THE CLERK: Give me just a second, Judge.
8 I can't off the top of my head. But I'm going to
9 look at my notes, and I may have something to send
10 back to you.

11 THE COURT: Now, the reason I'm dumping a
12 lot of information on you is because I'm about to ask
13 you a question, and I want it to be as informed as
14 possible. And that's how long you think the voir
15 dire will take for you to do your voir dire. I'll
16 give you my philosophy that I think that it's
17 important that you conduct some voir dire.

18 But on the other hand, I've got to tell you
19 that because of the way other judges do voir dire,
20 lawyers don't get much voir dire anymore. And so, as
21 a result, unfortunately, I'm not seeing good voir
22 dire, because people don't get to practice it
23 anymore. So I tend to, within reason, allow you to
24 do some voir dire, but I also begin to probably put
25 some limits on it. I'm not one of those judges that

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1 just says, no, the judge is going to ask all the
2 questions. So I'll give you some voir dire. But I
3 probably am not going to just let it go on forever
4 given particularly the logistics we're going to have
5 to do in this trial.

6 There was one other thing I remembered I
7 wanted to tell you. I can't think of anything else
8 unless Ms. Wild does. I'll hush.

9 Let me now ask -- and this is for anybody
10 if you've had a trial with me or haven't had a trial
11 with me -- anybody want to ask me some questions
12 about how I do voir dire, how we're going to do voir
13 dire before I begin to ask y'all questions about how
14 long your voir dire is going to take?

15 THE CLERK: Judge, did you explain to them
16 how you seat the jury?

17 THE COURT: That's a good point. So what
18 we will do for this trial -- and I didn't tell you
19 last time, Ms. Wild -- and you might need to explore
20 this -- for the first time the marshals approached me
21 about the fact that I had jurors sitting in the well.
22 That was a one-defendant case. And they began to --
23 what I typically do is the 14 jurors in the box over
24 here, as you know, when you come into federal court,
25 we don't have the old wheel, so we don't pull numbers

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1 out anymore like in the old days, you'd put
2 everybody's name in there and you'd pull it out and
3 you give them a number. But it's still done the same
4 way, but it's just done electronically. So when the
5 jurors show up, we check them off, we take their
6 names and put them in the computer, and it randomly
7 draws the names. So you go from the computerized
8 list that you're getting over the next three batches,
9 you're getting an alphabetical list. It goes from
10 that to a randomly selected list. So when the jurors
11 begin to come in, the 60 will go 1 through 14, and
12 then, if the marshals allow it -- I wasn't sure why
13 in that particular trial for the first time they
14 began to balk on this -- but assuming that they let
15 me do it the way I always do it, where Mr. Lowry, Ms.
16 Duncan and Mr. Baca are seated, that row, which looks
17 to me shorter than the row I have in Albuquerque,
18 normally that row is 15 through, what about 22,
19 Ms. Wild?

20 THE CLERK: Correct.

21 THE COURT: 22, and then it goes back over
22 here where Mr. Herrera is. And on the back -- I
23 guess we've got a front row there, don't we, which is
24 not the way it is in Albuquerque. So if they'll let
25 me do it, I'll put -- where Mr. Herrera is sitting --

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1 be 23 through -- is it 31?

2 THE CLERK: Through 30. But that well is
3 going to be pretty crowded, so I'm not sure that
4 that's a good option to use those rows. We can talk
5 about it.

6 THE COURT: Well, the interesting thing is
7 this is a lopsided room, in the sense that instead of
8 it being balanced, the door in the middle, it's short
9 on my left, and it's long on the right. But anyway,
10 that's the way I line them up. The reason for that
11 philosophy was, is those 14 jurors over here in this
12 box, if they're unstruck and unchallenged, they're
13 going to be your jury. And so it always helped me
14 visually -- I'm sort of a visual guy -- to look at
15 that jury box and go, if I don't take care of those
16 jurors, they're going to be my jurors.

17 So what you will do is we'll give -- I
18 think we've already discussed this about peremptory
19 for cause challenges, of course you get to make those
20 as need be. So when we do the for cause challenges,
21 I will ask for the for cause challenges by number and
22 name, no argument. And we'll see if we agree on some
23 folks. And then those that we don't agree on, then
24 we'll start arguing those.

25 And then we will confirm the unstruck --

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1 we'll confirm the people that are struck from the
2 venire. Then, after that, we will give peremptory
3 challenges, the defendant get 10, the Government gets
4 6. We'll go with six rounds. The Government leads
5 off round one. The defendant leads off on the
6 alternate rounds, so for the first four rounds, is my
7 memory, is that for the first four rounds, the
8 defendants get two peremptory challenges each round.
9 The Government gets one. So in the six rounds the
10 Government only gets one peremptory challenge for the
11 first four rounds. Defendants get two. Then the
12 last two they only have peremptory challenge. So
13 that's the 10, that's the six.

14 So that will pretty much -- then I'll seat
15 the first 12 unstruck, unchallenged jurors. We'll go
16 ahead and select 16. That will be the alternates.
17 Then I'll have to look at the rules. There actually
18 is a rule or statute, when I got two alternates, I
19 give each side one peremptory challenge to be
20 exercised against the alternates. I just can't
21 remember on four alternates whether you get two
22 peremptory challenges, or maybe even three. Whatever
23 the statute permits, the rule permits, you'll get
24 that. And then we will have those as our alternates.
25 So it will be the first unstruck, unchallenged.

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1 Mr. Castellano?

2 MR. CASTELLANO: Your Honor, will this be
3 an anonymous jury, so we address them only by number
4 or will we be using names as well?

23 What do you think, Mr. Castellano?

1 Brack does it in pretty much every case, so this is
2 par for the course in his courtroom. My preference
3 would be to have an anonymous jury and refer to them
4 by number. But as the Court said, you may also start
5 just by asking the jurors how they feel about it.

6 THE COURT: And I've never done an
7 anonymous jury. I always felt like it took something
8 out of the room when we start using numbers. But I
9 don't know, how do the defendants feel? I mean, it
10 could cut two ways. I mean, if we use numbers, they
11 may relax and feel like nobody knows them, and that
12 may give you a better jury. Mr. Benjamin?

13 MR. BENJAMIN: I like names, Judge.

14 THE COURT: You like names.

15 MS. BHALLA: Yes, Your Honor. I mean, from
16 our perspective, we definitely want names. It's very
17 dehumanizing. It makes the whole process very
18 sterile. I think that in my experience, when I've
19 been in state court trials when we've done that, it
20 really seemed to clam people up rather than when you
21 can use names, people just get more relaxed, they get
22 more open. I would really object to that, Your
23 Honor.

24 THE COURT: I will tell you this, 14 years
25 ago, when I was starting out with juries, jurors

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1 never seemed to be concerned about their safety.
2 But, boy, they've gotten more so over the years. I
3 don't know what it is. But jurors seem to me more
4 antsy about, when I try a drug conspiracy case or
5 some violent crime or something up in Albuquerque,
6 used to, jurors just come in and do their job. But
7 now they want you to walk them to the car and all
8 sorts of stuff. Have you given that side of it a
9 thought, about if you think you'll get a fairer trial
10 if they feel like they're sitting there listening to
11 all this evidence, and the defendants know their
12 name, that's going to scare them off?

13 MS. BHALLA: I think it goes the opposite
14 way, Your Honor. I think if you refer to them as
15 numbers, I think that that makes them concerned about
16 why their names aren't being used.

17 THE COURT: Remember, they don't know a
18 whole lot different. And we -- if Judge Brack is
19 down here using numbers all the time, they don't know
20 the difference a lot.

21 MS. BHALLA: You know, Your Honor, I don't
22 know that I agree with that. I think that they would
23 definitely make that link in their minds, especially
24 with the security in the courtroom. I think that
25 we've got to try and minimize that aspect of it. And

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1 I think using names is the best way to do that. I
2 just don't think -- I think that would be
3 prejudicial, to be quite honest with the Court.

4 MR. BENJAMIN: Your Honor --

5 THE COURT: You know what, I need to hear
6 from some others. I'll come back to you,
7 Mr. Benjamin. You know, I think the AO is now
8 encouraging everybody to use numbers. So it's going
9 to be hard to probably complain about it, either way
10 we go.

11 Mr. Cooper, you were I think up next, then
12 Mr. Lahann.

13 MR. COOPER: Judge, there are a lot of
14 really good defense lawyers in this room. And I love
15 picking juries. I love talking to those jurors. And I
16 know a lot of my colleagues here do, too. And I
17 think we're going to make them feel comfortable when
18 we talk to them. When I can stay, Hi, Ms. Martinez,
19 you know, the Judge talked to you about this and that
20 and the other thing. And Mr. Smith, you said this
21 and that. I think it's so much more personal if we
22 can address them by name. And I would really object
23 to -- I think we pick a better jury if I can talk to
24 Mr. Martinez and Mrs. Smith. So I think that picking
25 a jury using their names, and I think my colleagues

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1 here are going to make everybody feel comfortable.

2 That's my two cents.

3 THE COURT: Mr. Lahann?

4 MR. LAHANN: Ditto what everybody said so
5 far. But, Your Honor, my client has a right to a
6 public trial. He's being judged on something that
7 will affect the rest of his life. And I think he has
8 a right to be treated with his name, and I think he
9 has a right for all the other participants to be
10 treated with their full names.

11 THE COURT: All right. Mr. Benjamin?

12 MR. BENJAMIN: Your Honor, I've tried two
13 cases in front of Judge Brack and used names both
14 times. That's my experience.

15 THE COURT: Okay. Well, I haven't seen
16 Judge Brack try a case, so I'll have to rely on
17 y'all.

18 MR. COOPER: So did I.

19 THE COURT: And he used names?

20 MR. COOPER: Yes, Your Honor.

21 THE COURT: Let me give you a little bit
22 more information. Over here on the row with
23 Mr. Baca, that seats 10, so that normally seats 10.
24 So if you're trying to get this in mind, that would
25 be 14, 15, through I guess 25, maybe it's 24. And

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1 then, when we go over here where Mr. Maynard and Mr.
2 Herrera is, that normally seats 12. So there is a
3 little bit of difference there. So if you're putting
4 together jury charts or something, it would be 12
5 over here and 10 over there. And we'll start with
6 14.

7 Ms. Bhalla?

8 MS. BHALLA: After you get to this side of
9 the courtroom on your right, to number, let's just
10 say 30 or 31, are you going to start 32 back this
11 way?

12 THE COURT: No. What I'll do is right
13 behind Mr. Acee, that will be Juror No. 15. It will
14 go down to -- it will be 25. And then where Mr.
15 Herrera is sitting, assuming that the -- maybe
16 Ms. Wild can add this to the list, but they'll let me
17 put them in the well, I'll probably seat Juror No. 26
18 where Mr. Herrera is, and then it will go down to --
19 I guess, that would be 38, and then we'll come over
20 here where Ms. Rodriguez is seated. And that will be
21 39 and go down. And the reason for that, it's a
22 little bit of a problem getting people in through the
23 pews. But I think it's better for our chart, if it
24 runs that way. So I'll probably deal with the
25 inconvenience of getting them in and crawling all

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1 over each other, but I think it makes a better chart
2 for everybody when we're trying to remember names.

3 All right. Any other questions about how I
4 pick juries, or how we're going to probably pick them
5 for this trial?

6 Ms. Wild, do you have anything to add
7 before I start asking the counsel questions?

8 THE CLERK: Not at this time.

9 THE COURT: All right. So given what I've
10 done, tried to explain to you, and probably you've
11 scouted out, Ms. Armijo, Mr. Castellano, how long do
12 you think your voir dire will take? You've had a
13 number of trials with me so, both of you together and
14 separately, so you've probably got pretty good
15 experience with me.

16 MS. ARMIJO: I think it will be less. But
17 just to be safe, 45 minutes.

18 THE COURT: How about you, Mr. Lowry, Ms.
19 Duncan?

20 MR. LOWRY: We'll take an hour, Your Honor.
21 If you think that's too long, we'll assess it.

22 THE COURT: Try to shoot for 55 minutes, no
23 more. Let's try to keep it under an hour.

24 How about you, Ms. Fox-Young?

25 MS. FOX-YOUNG: I think, you know,

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1 something on the order of 45 minutes, 30, 45 minutes.

2 THE COURT: Just remember, if everybody
3 takes an hour here, we're not going to get it done
4 that first day.

5 MR. LOWRY: It's hard to judge, Your Honor.

6 Get the jury to open up, it goes relatively quickly.

7 THE COURT: I understand. I understand.

8 Ms. Jacks? Mr. Jewkes?

9 MR. JEWKES: 45 minutes.

10 THE COURT: Mr. Maynard? Ms. Bhalla?

11 MS. BHALLA: Your Honor, I mean, I'm going
12 to try to get it done in 20 minutes. I don't want to
13 constrain myself too much. I don't think we'll be
14 going first. So I think we, realistically, can do it
15 in 20, 25 minutes.

16 THE COURT: All right. Mr. Adams? Ms.
17 Sirignano?

18 MR. ADAMS: I really don't know, Your
19 Honor. If the upper end mark is 55 minutes, we'll
20 sign up for 55 minutes. I'm sure we'll be less than
21 that.

22 THE COURT: Yeah, and I'm not telling you
23 that's the absolute cap. I'll get in the flow and
24 see what happens, if you feel like something needs to
25 be done. But just for planning purposes, let's try

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1 to keep it under an hour. I mean, I'd still like to
2 get the jury picked on the first day. I mean, I've
3 always been able to do that, and I think we should be
4 able to do it. But with this many defendants, this
5 much voir dire, so if we can kind of put a little
6 pressure on ourselves, particularly on the defense
7 side, to try to really cooperate on the defense side,
8 and try to keep the voir dire down, I think we've got
9 a fighting chance of getting it picked. If not,
10 we're going to have to bring 200 people back the next
11 day.

12 And remember, we've got a statewide venire
13 here. These people are going to be coming from all
14 over the state. So that's going to be a real burden,
15 if we have to put up a bunch of people overnight.
16 It's just going to be expensive, and keep them here.
17 And so if we can work to try to put a little downward
18 pressure on the venire, that would be great.

19 I mentioned this earlier. Let's everybody
20 make sure that when we get the defendants -- when we
21 get to the trial, that we make certain that the
22 defendants are at the table before we bring the jury
23 in, or bring the venire in, or anything like that.
24 So let's just really watch. I'll put that burden on
25 the Government, put it on myself, put it on my staff,

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1 my law clerks, everybody. Let's just make sure that
2 we've got those defendants seated over at that table
3 before we bring in the jury or the venire in.

4 All right. I think that I'm going to skip
5 a few things. Let's see, we've already got on our
6 schedule the instructions. One thing on the
7 instructions -- I'm going to skip around a little bit
8 and then I'm going to come back to witnesses here --

9 MR. ADAMS: Judge, may I ask one thing
10 about jurors before we move on?

11 THE COURT: Yes.

12 MR. ADAMS: We get the questionnaires in
13 advance. Is there going to be a time where we are
14 whittling down people with the prosecution and
15 dealing with that before the voir dire, or how do you
16 anticipate that going?

17 THE COURT: Ms. Wild, let me -- I can
18 either turn it over to you, or I can bumble through
19 it and see if you agree with me. But I think that I
20 would like to see happen -- and maybe Ms. Wild is
21 thinking of something different.

22 THE CLERK: We already have agreed on
23 dates.

24 THE COURT: All right. So you're aware of
25 that?

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1 THE CLERK: January 15 is when they're
2 supposed to submit their agreed and disputed for
3 cause challenges. And your ruling on the disputed
4 challenges will be on January 22.

5 THE COURT: Okay. So did you remember
6 that, or does that answer your question?

7 MR. ADAMS: How about if I answer yes, sir?

8 THE COURT: Well, what I'm envisioning is
9 between now and the 15th, y'all working with the
10 Government and then giving me a list of everybody you
11 agree on. And let me suggest this: And I may have
12 said this earlier, but I'll go ahead and repeat it
13 now that we're getting very close to this. You know,
14 I'm not telling you to not fight for jurors that you
15 want. But I would suggest that, at least the rule
16 going in to negotiations should be some generosity to
17 both sides. You know, if you've got a juror that you
18 know the Government is going to get kicked off for
19 cause, why fight for it? Because I might give you a
20 chance to fight for it, but they're going to end up
21 with one of the 60 in here, and you're going to be
22 wasting a lot of questions, a lot of time. So, at
23 least going in into negotiations, try to be a little
24 bit generous. Put your feet in the shoes of the
25 lawyers on the other side, because I think it's in

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1 everybody's interests to knock off jurors that are
2 going to get knocked off eventually for cause. And
3 if y'all want to question me a little bit about how I
4 do for cause and some things like that, I'd be glad
5 to tell you as much as I can, so you can make
6 informed decisions.

7 And then, the ones in which you can't agree
8 on, I guess I'm supposed to give you an answer on the
9 22nd. So the ones that are in dispute, I probably
10 will not quibble with you, so if y'all agree to knock
11 off, you know 50, 60 people, I'm probably just going
12 to knock them off, and then just deal with the ones
13 in which y'all can't agree on.

14 MR. ADAMS: That's fine. And Judge, I'm
15 sorry, I just did not remember that being in the
16 scheduling order. So thank you for clarifying that.

17 THE COURT: All right. And I'll just go
18 ahead and say, if y'all agree on somebody getting
19 knocked off, that's probably fine. Let's talk about
20 some broad categories of people. Let's talk about
21 the scheduling problem people. I do these different
22 in every trial, so I have no consistency here. I'll
23 admit it right off the bat. Because I'm really
24 taking my cues from the lawyers. If the lawyers want
25 to knock off people for scheduling problems, and they

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1 both agree, I will go along with it. If you don't
2 want to knock people off for scheduling problems,
3 I'll hang tough with you. I'll be the bad guy and
4 tell them they've got to serve on the jury. I do
5 that because sometimes people get particular profiles
6 on jurors they want. We're doing cases off the
7 Indian Reservation, sometimes there are particular
8 profiles we're looking at, trying to get certain
9 jurors on there and stuff. So I don't want to
10 interfere with your -- with what you're doing as far
11 as picking a fair and impartial jury. But chances
12 are -- let's say -- and I'm not saying this is the
13 case -- let's say the Government wants to knock off
14 everybody that has a scheduling problem over eight
15 weeks, and the defendants won't knock off anybody
16 that's got scheduling problems. You've got a
17 particular profile. You're not going to go along
18 with that. So the mother has got a two-year-old
19 child and day care problems and no working vehicle,
20 and the Government wants them -- and the Government
21 wants them knocked off and the defendants don't, I'll
22 probably hang tough with the defendants on that
23 thing. But, you know, we may get that person on the
24 jury. It's amazing how it's always that problem,
25 that Juror No. 7 up there is the one that begins to

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1 be a problem. And in an eight-week trial, you know,
2 think about it, you may not want that problem every
3 day coming in here, and having to figure out if
4 they've got day care issues, or something like that.

5 Anything else you want to ask me on my
6 philosophy on peremptories, so that, as you begin to
7 make negotiations on the 15th, and try work to
8 through the for causes?

9 Ms. Wild, you probably know me pretty well.
10 Anything else you want to tell me about what I do on
11 for causes?

12 THE CLERK: Not at this time.

13 THE COURT: Okay. So anything else on
14 that, Mr. Adams? Do you understand how that's going
15 to work?

16 MR. ADAMS: Yes, sir.

17 THE COURT: All right. And I'll just make
18 the call. Mr. Blackburn.

19 MR. BLACKBURN: Your Honor, not on that
20 issue. I can't recall, do you have us, the lawyers,
21 introduce the clients, or do you?

22 THE COURT: I will prompt you through, but
23 I will have you introduce your client. I always
24 think that's better. Don't you?

25 MR. BLACKBURN: Yes. I was just wondering,

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1 now that we're going to have the shackles and stuff,
2 that may impact that. That's why I asked.

3 THE COURT: All right. Well, that's
4 something we'll have to think about. But I think
5 it's better if you introduce your client and you
6 introduce him the way you want.

7 Mr. Castellano.

8 MR. CASTELLANO: Your Honor, just thinking
9 ahead to the voir dire and the security issues. The
10 defense is at this table. There will be a moment in
11 time when jurors on this side will be able to see
12 both sides of the table. So I just put that out
13 there now, so we'll be thinking about security and
14 how we want to set that up.

15 THE COURT: Okay. Yep, we're going to have
16 to think about that. So I'll ask Ms. Wild to add
17 that to her list, we're going to have jurors sitting
18 where Ms. Duncan, Mr. Lawrence, and Mr. Baca are
19 seated. So sitting behind there, they might be able
20 to see behind there.

21 All right. If there is nothing else on
22 jury selection or voir dire, the venire, for cause
23 challenges -- on instructions, when you file your
24 instructions and you do need to file your
25 instructions, you need to file your objections. You

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1 also need to send to my proposed text -- so y'all
2 have gotten used to that when you send a proposed
3 order -- file your jury instructions, so that's a
4 matter of record on CM/ECF, for appeal purposes. But
5 also send your set in executable format to me at my
6 proposed text. Because I'll be working off your
7 executable set of instructions to put my jury
8 instructions together.

9 You do not need to do the old thing of
10 sending one clean set and one with citations, and 16
11 copies to chambers, and all that sort of stuff.
12 Just -- all you need to do is file one set with your
13 citations. And then you may want to file a separate
14 document of objections. And whatever you file on
15 jury instructions needs to be sent to my proposed
16 text address.

17 All right. Let's talk a little bit about
18 the case description. Is there anything in the
19 scheduling order, Ms. Wild, about the case
20 description?

21 THE CLERK: I don't believe so, Judge.

22 THE COURT: All right. So let me do this:
23 Unless anybody has an objection to this, let's do
24 this on the same -- Ms. Armijo, you had a scheduling
25 order out -- or Ms. Wild, do you have -- Ms. Wild, do

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1 you have the scheduling order out in front of you?

2 THE CLERK: Yeah, let me get it up in front
3 of me. Hold on a second.

4 THE COURT: I think Ms. Armijo said the
5 12th was the day that you're filing jury
6 instructions? Are there objections to that after
7 that, Ms. Armijo?

8 MS. ARMIJO: Yes, Your Honor, January 19.
9 And also on the 12th, we have proposed voir dire,
10 disclosure of exhibits, and witness lists. Of
11 course, the witness lists, the United States has done
12 one at least.

13 THE COURT: Okay.

14 Let's talk about the case description.
15 Here's what I would propose is, if there is nothing
16 on the scheduling order about case description, why
17 don't the -- why don't we do this? By January 8, by
18 the end of business on January 8, the Government
19 generate a case description. I assume that this case
20 is of a nature that you don't want me just to be
21 reading the indictment. If you want me to just read
22 the indictment, I can. I haven't looked at the
23 indictment in a while. So it might need to be marked
24 up some. But it strikes me that this might be not
25 the time to just use the indictment as a case

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1 description.

2 So unless somebody has something different
3 to say on this, I'll ask the Government to generate a
4 first draft of the case description; send it over to
5 the defendants by the end of business on the 8th.
6 The defendants look at it on the 8th and 9th, and get
7 back with the Government by the end of business on
8 the 10th. See how much you can agree on by that
9 point. If you cannot agree on a full case
10 description, at least tell me what you can agree on
11 and what you don't agree on. It's not as helpful to
12 me if the defendants just send me another case
13 description. It's better if you try to work it out
14 so that you agree on as much as possible, and send me
15 a marked out, struck, highlighted, whatever, showing
16 me where the disagreements are.

17 And let's have that filed -- both sides
18 file their competing drafts or disagreements, so I
19 know what the disagreements are by the end of
20 business on the 11th. And I'll try to generate
21 something and send it back to you, and see if you
22 have any objections.

23 Anybody have any problem with that
24 procedure? Ms. Armijo?

25 MS. ARMIJO: No, Your Honor.

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1 THE COURT: Any of the defendants? Does
2 that sound okay? So we won't be using the
3 indictment. We'll be using a case description.
4 Remember that all the case description is for --
5 don't kill each other and yourselves over this. The
6 only thing it's used for is when the jury comes in
7 the room, and I ask the question: Do you know
8 anything about this case, and I read to them the case
9 description, it is meant to sort of trigger in their
10 mind, do they know anything about this case.

11 Now, remember in your questionnaires, you
12 have a lot of information on there, so they're going
13 to know a fair amount, I think, about this case a
14 little bit, generally, from what you've told them.
15 But I do think we need to do it again, because we
16 need to bring those people probably up to the bench,
17 and find out what they know, and whether what they
18 know keeps them from being a fair and impartial
19 juror.

20 MS. HARBOUR-VALDEZ: Your Honor, for
21 clarification, this is just for trial 1 group;
22 correct?

23 THE COURT: Yes. Let's just do these for
24 the first trial. And we'll -- are you envisioning
25 another pretrial conference for the second trial,

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1 Ms. Wild?

2 THE CLERK: I am.

3 THE COURT: So we'll do that. All right.

4 Anything on case description?

5 All right. Let's do proposed voir dire.

6 Ms. Armijo, did you say there was a date in the
7 scheduling order for proposed voir dire?

8 MS. ARMIJO: Yes, January 12.

9 THE COURT: All right. And is that all it
10 says about proposed voir dire?

11 MS. ARMIJO: And there is also objections
12 to that on January 19.

13 THE COURT: All right. So between the 12th
14 and the 19th, try to talk to each other about voir
15 dire. See if you can work it out. And if you can't
16 work it out, then file your objections, and then I'll
17 try to rule on them. I'm fairly liberal to each
18 side. I mean, there are limits. But y'all probably
19 noticed I struck out some things on your special
20 questionnaires. I didn't think we needed to get into
21 their religion. I didn't think we need to know what
22 political party they were. So there were some limits
23 on that. But by and large, I'm fairly generous on
24 voir dire. Take a look at it, talk to each other,
25 see if you can work it out. If you can't, file your

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1 objections by the 19th, and then I'll try to rule on
2 it.

3 One thing I was going to mention on voir
4 dire, if y'all think that there are certain questions
5 that need to be asked -- although I can't imagine how
6 much more of this we could ask them, after we did
7 that questionnaire -- but if you think of something
8 that ought to come out of my mouth, that I ought to
9 ask the question rather than y'all, see if you can
10 agree on it, submit it to me, and tell me you want me
11 to ask that as part of mine.

12 Otherwise, I'll expect you -- sometimes
13 people draft the proposed voir dire as things that
14 they are going to ask the Court to ask. I'll expect
15 you to ask most of that, unless it's something that
16 I've already told you I'm going to ask about. So if
17 you decide that, as you get closer, there are certain
18 questions that you think would be better coming out
19 of my mouth and you prefer not to ask, talk with each
20 other and then submit those.

21 All right. We know the jury list.

22 Courtroom technology. Y'all have used it
23 here over the last month, so you know how the
24 courtroom works. If you need something else, talk to
25 Ms. Wild about it, and we'll work with you to provide

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1 that technology. I would encourage you that if
2 you're going to use technology, that you make a time
3 with Ms. Wild and Ms. Standridge to come over and
4 practice and make sure it interfaces. We'll get our
5 IT people in the courtroom, and they can work with
6 you to make sure it works. So do take advantage of
7 that. We'll work with you to make the courtroom
8 available, our IT people available, to try to make
9 sure it interfaces well.

10 We talked about jury instructions. As Mr.
11 Castellano mentioned, I generally have my courtroom
12 deputy place on the Elmo a copy of the jury
13 instructions that I will read so that the jury can
14 read along with me as I read them the jury
15 instructions. Anybody have an objection to them
16 visually seeing the jury instruction as I am reading
17 them? From the Government? Ms. Armijo? Mr.
18 Castellano?

19 MS. ARMIJO: No objection.

20 THE COURT: Any from the defendants? Not
21 hearing any, we'll put those on the Elmo.

22 The same -- let's see, with jury
23 instructions, I generally send back one set of jury
24 instructions to the jury so they each have a set of
25 jury instructions that I've read. And then only one

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1 verdict form goes back. So there is one verdict
2 form, but each one has a set of jury instructions.
3 Is that okay, Ms. Armijo?

4 MS. ARMIJO: Yes, Your Honor.

5 THE COURT: Any of the defendants have a
6 problem with that?

7 All right. Let's talk about exhibits.

8 Many of you are -- we'll do the cutoff at Ms.
9 Sirignano's age. So everybody that's below her in
10 high tech are not going to have a problem with this.
11 Everyone my age begins to maybe stumble around on
12 JERS. Now, JERS is spelled J-E-R-S. I'm not saying
13 it like I'm from Hobbs and I'm talking about jurors.
14 I meant JERS. Now, for those of you who are not
15 familiar with the system here in the District of New
16 Mexico -- maybe Mr. Adams is, because I think we
17 borrowed the technology from South Carolina. I think
18 they invented it in the federal court there, but we
19 were right there on their heels.

20 So, in the old days, you'd take all the
21 exhibits after the trial and take them to the jury
22 room, and you'd bundle them up, and give them a gun
23 and heroin all at the same time, and hope they came
24 out in a few hours with an appropriate verdict. We
25 don't do that anymore. I don't know about real

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1 evidence, maybe we still do it, I don't know. But we
2 put all the exhibits on a disc, and it goes back.
3 And they have a video screen. You can come over and
4 look at it. We'll give you a tutorial, so everybody
5 is comfortable with it. But it does make the
6 presentation of the evidence in the jury room better.
7 So let's plan on using it. I know we get stuck in
8 our ways. We need to drag ourself into 2018 and step
9 it up. So the burden falls mostly on the Government
10 since they have most of the exhibits. But JERS
11 stands for Jury Evidence Recording System. So just
12 like when you're watching -- I know I never do this,
13 but you're watching the NFL Network, and you've got
14 all the screens up there, and you just pull up the
15 games with the remote control. That's basically what
16 you're doing in the jury room. They can pick up the
17 audio. They pick up all the documentary evidence.

18 Real evidence, I guess, it will have to
19 still go back there. But let's work to get that
20 done. Sometimes what happens is, despite my
21 admonition, people begin to bail out, and try to get
22 out of it as the trial goes on. I'm trying to pull
23 the U.S. Attorney's Office into the 21st Century. So
24 I'm going to put pressure on them to get it done.
25 Defendants, you'll need to do it too, work with the

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1 Court. If you want a tutorial, we'll give it to you.
2 We'll take you back there and make you comfortable
3 with it. It's fine.

4 If you think about it, one of the things it
5 does, instead of Juror No. 11 over there looking
6 through this binder, and this juror over here looking
7 at this, they have to look at it together. So I
8 think it does have some benefit of pulling the jurors
9 together, and they have to watch television together,
10 rather than just sitting in the corner and looking at
11 this exhibit and that exhibit, it pulls them
12 together. So I think from Harvard MBA group
13 dynamics, it has some benefit of pulling jurors
14 together and making them begin to do some stuff
15 together at the beginning, and that's review
16 exhibits, and ultimately them voting on how they're
17 going to -- what verdict they're going to return. So
18 let's work hard and we'll be glad to try to help you
19 do that.

20 You've gotten used to my numbering system.
21 So the Government gets the numbers. Theirs is real
22 easy. I think we've worked out a system unless Ms.
23 Wild tells me it's not a good system. Let me ask
24 you, Ms. Wild, and then I'll ask the defendants: Is
25 there any reason for purposes of the trial that you

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1 can think of that the defendants need to separate
2 their exhibits by name? In other words, we've
3 been -- in this hearing we've been saying Carlos
4 Herrera Exhibit A, Mr. Perez Exhibit A. We've been
5 breaking out by name. Is there any reason that we
6 can't just run Defendants A through Z, and then if
7 they're done with those letters, they go back and go
8 AA, AB, AC. And then if they run out of that, it's
9 BA, BB, BC? Is there any reason to break it out by
10 defendants, or should we do it just by individual
11 defendants, so their name is on it, and then run
12 separate letters for each defendant, or should we
13 just run one set of defendants exhibits?

14 THE CLERK: I think for clarity of the
15 record that, because in some instances I'm imagining
16 only one defendant could be moving something. But it
17 would be useful to utilize the system we've been
18 using for this hearing, unless the defendants
19 collectively have a different view. But that's my
20 gut reaction to that.

21 THE COURT: Well, it's been working here in
22 the courtroom for the purposes of the evidentiary.
23 Anybody have any problem with just continuing that?
24 Ms. Jacks?

25 MS. JACKS: I just have a suggestion how

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1 this has worked in other multidefendant cases, where
2 each defendant starts with what, like say Sanchez
3 would start with 1000. Baca would start with 2000
4 another defendant would start with 3000. So they're
5 numbered, but each defendant has like a sequence of
6 numbers. I prefer numbers over letters because it's
7 easier for me to keep track.

8 THE COURT: Well, I'll probably do letters.
9 I need to -- in certain things I probably just need
10 to stay steady rather than have a bunch of numbers
11 floating around. So I'll probably stay with letters.
12 All right. Anything else on that?

13 All right. Ms. Wild, I'm beginning to run
14 out of general stuff. I'm about to switch back to
15 exhibits and witnesses and discovery and evidentiary
16 issues and motions in limine and Daubert, and
17 anything like that. Can you think of anything else
18 from a general standpoint we need to talk about to
19 finish the pretrial conference?

20 THE CLERK: Did you cover the mechanics of
21 the submission of the jury instructions, and how that
22 needs to be done in terms of ensuring that
23 anything -- everything needs to be filed, needs to be
24 provided to us in an executable format at your
25 proposed text email address.

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1 THE COURT: I think we covered that.

2 THE CLERK: One instruction per page.

3 THE COURT: Didn't cover that.

4 THE CLERK: Don't need a clean set, just a
5 dirty.

6 THE COURT: Covered that.

7 THE CLERK: Okay. That's all I have.

8 THE COURT: All right. Anything else we
9 need to cover about the trial? Many of you have had
10 trials with me, others haven't. Anything you want to
11 ask me, this would probably be the time to do it as
12 to how I conduct a trial, or what I allow, what I
13 don't allow. Don't feel shy about asking. Anybody
14 want to know how I do things or what I allow?

15 All right.

16 MS. ARMIJO: Your Honor --

17 THE COURT: Ms. Armijo?

18 MS. ARMIJO: When we approach the bench,
19 there is obviously going to be -- my math skills are
20 not very good -- 13 attorneys. Are you going to have
21 any rules about if we're all going to go up there?
22 Are you going to allow just one attorney per team, so
23 to speak? Just something to think about so that the
24 first time it happens, we're not all rushing up there
25 and creating chaos.

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1 THE COURT: Yeah. Well, I'm not going to
2 restrict the attorneys that come up. If y'all want
3 to self-select, for example, who comes up, that's
4 y'all's business. But I probably won't restrict the
5 attorneys from coming up. If, during the trial,
6 y'all want to have one, particularly during the voir
7 dire, if you want to just have one coming up, and
8 dealing with stuff. But I probably am not going to
9 limit you. It will be harder.

10 Remember when you come up, if you're the
11 speaker, you need to speak into this. Because
12 Ms. Bean is going to put on earphones, and I'm going
13 to fog the machine. So you'll need to be the one
14 that's speaking here. So if you're lawyer number 13
15 out there, you know, you may not get -- you're going
16 to have to come in here and speak.

17 You know, I will probably have to put
18 limitations on tag-teaming in examinations with this
19 many lawyers. So no tag-teaming. If you stand up
20 and object, I'm probably going to be expecting Mr.
21 Adams to do the examination, not Ms. Sirignano. So
22 pick your champion on each witness and stick with it,
23 and don't switch. You're not going to get to have
24 Mr. Adams cross-examine a while and then Ms.
25 Sirignano for a while. We're not doing it that way.

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1 So pick your lawyer for each witness, and I'll
2 probably not allow tag-teaming for each witness.
3 You're welcome to switch around, have one lawyer on
4 one witness and another lawyer on another witness,
5 but not two lawyers on one witness.

6 Anything else, Ms. Wild?

7 THE CLERK: And you explored if the defense
8 would be giving their openings at the beginning of
9 the case.

10 THE COURT: For the time being, we're
11 planning on their doing their openings at the
12 beginnings, and we have the times on it.

13 THE CLERK: Thank you.

14 THE COURT: If the defense would send me a
15 letter telling me in what order they're going to do
16 it, that way, at least I can call on you. If you
17 have preference as to how you want to -- if you want
18 to do the same order throughout trial, just let me
19 know; that way, I'll call on you and do it. If you
20 want to just play it by ear during the trial, at
21 least for openings, I think you can probably plan
22 ahead. So send me a letter so I've got it up here,
23 and I can call on you, and we look like we're
24 organized and know what we're doing. I'll call on
25 you in that order.

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1 If you want to do something throughout
2 trial that I call on a particular order for a
3 cross-examination in the Government's case, and how
4 you're going to present your case in the defendants'
5 case-in-chief. So think about that, and just give me
6 direction. I don't have any particular views on
7 that. But y'all may. And we'll try to look like we
8 had a pretrial conference and got together and
9 discussed those things.

10 Anything else, Ms. Wild?

11 THE CLERK: Not at this time.

12 THE COURT: All right. Let's then go back
13 to -- unless anybody has anything on this, let's go
14 back to the motion list, which I think brings up sort
15 of getting to some of the core issues that we have
16 on -- give me just a second to get a little organized
17 here.

18 All right. Ms. Armijo, Ms. Wild, if you'll
19 remind me of what the -- what it says on the
20 scheduling order about witnesses. What does it say
21 on that?

22 MS. ARMIJO: Well, Your Honor, it says
23 January 12, 2018, witness list. But I believe that
24 when we were at one of our previous hearings, you had
25 ordered the Government to be overinclusive, and to

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1 file a witness list, which we've done.

2 THE COURT: Okay. Well, let me ask the
3 Government this before I start imposing things: On
4 your January 12th list that you're going to file by
5 January 12th, what is it that you're thinking of
6 filing, you're wanting to file? And let me see if I
7 can work with that before I start telling the
8 Government what to file. What's your thinking about
9 what you're going to file on the 12th?

10 MS. ARMIJO: You mean as far as witness
11 list, or the --

12 THE COURT: Yes.

13 MS. ARMIJO: Well, we've already filed one.
14 We probably would file another one and try and make
15 it a little bit more tailored to witnesses that we
16 would be calling. It still may be a little bit --
17 have people that we may not, but just in an abundance
18 of caution, so that we're not caught short, if we
19 have to call somebody, have some people on there.
20 But it would be shorter, I would imagine.

21 THE COURT: Let me ask some general
22 questions, see if we can maybe hammer something out
23 that's useful to everybody, and still allows the
24 Government to do what it needs to do. Thinking of
25 your case-in-chief, how much witnesses -- let me ask

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1 this question -- it goes back to how long this trial
2 is going to last. How long do you think it's going
3 to take the Government to put on its case? Of the
4 six to eight weeks that we're talking about, how much
5 of that time do you think is going to be the
6 Government putting on its case?

7 MS. ARMIJO: If I could just have a moment,
8 Your Honor.

9 THE COURT: You bet.

10 MS. ARMIJO: Four weeks.

11 THE COURT: Now, thinking about your
12 case-in-chief, how many witnesses -- not naming the
13 witnesses -- but how many witnesses do you think
14 you're going to be putting on in that four weeks? Do
15 you think you're looking at 20, 30? What do you
16 think that four weeks is going to look like?

17 MS. ARMIJO: Approximately 30.

18 THE COURT: Do you think that 30 is a
19 conservative number? Or do you think that number --
20 by that I mean does that leave you a little bit of
21 cushion, or do you think that's a number that is one
22 that, if we worked with 30, it's going to get you
23 into trouble?

24 MS. ARMIJO: As long as -- I think it's a
25 good number. I think it gives us a little bit of

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1 wiggle room. And depending on cross-examination and
2 defenses that we see, things like that -- I mean, we
3 may have to add to it. But that's probably a good
4 number.

5 THE COURT: Okay.

6 MS. ARMIJO: Certainly, if as we start to
7 really get into things, if it's more, we'd let the
8 parties know. But I think that's a fair estimate.

9 THE COURT: Okay. Now, don't anybody panic
10 here, but here's what I'm going to propose, and then
11 we'll see if there is something here to try to work
12 with to address the defendants' needs and the
13 Government's needs. What if I required, by January
14 12, a witness list that it was of this structure;
15 that on the -- there will be at the top of the
16 witness list, there will be a will call list. It
17 will not exceed 35 names. Those will be the people
18 that, in the Government's best estimation, good
19 faith, they think they will be calling and -- well,
20 just will be calling. And then everybody else will
21 be at the bottom in a may call list. And then
22 another category -- although I want to talk about
23 it -- is rebuttal witnesses at the bottom. Now,
24 while everybody is beginning to absorb this sort of
25 idea, by rebuttal witnesses I take a fairly narrow

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1 view of rebuttal witnesses, in the sense that if --
2 if the testimony can be anticipated, I don't think
3 that they're really rebuttal witnesses. So we know a
4 lot about what the defendants are going to do and
5 say. We've watched some of it. So if it's something
6 that we think they're going to do, we've seen them
7 do, or there is any possibility they can do, I think
8 they probably need to be above the rebuttal line, not
9 below the rebuttal line. So the rebuttal line might
10 be a zero for you, because those are really the kind
11 of witnesses that you can't anticipate. You just
12 didn't know the defendants were going to do anything
13 like that. You can walk up here and tell me at the
14 bench, Judge, I didn't have any idea they were going
15 to go that direction. So your rebuttal line may be
16 zero. But if you gave them a will call that's 35 or
17 under, and then you had a may call that, at this
18 point, with five defendants, you could cut down as
19 much as you can, if you know people are not going to
20 be called, if you could knock them off the list, so
21 they're not assigning those to various people, I
22 would think that's probably how they're going to do
23 this. They're going to sit down and probably divide
24 up the will calls among some lead lawyers. And then
25 the will call, maybe more junior lawyers are going to

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1 get some will calls. But if you can try to reduce
2 the number of people on that list, and so that
3 reduces the amount of work they've got to do, could
4 you live with that, as far as the defendants' request
5 for an updated witness list?

6 MS. ARMIJO: We could certainly try, Your
7 Honor, to meet that. And if we're having issues,
8 then we'd let the parties know. But we could
9 certainly try.

10 THE COURT: Okay. Ms. Sirignano, I think
11 you've been taking the lead on this. Why don't I
12 hear from you. If I were to order that as to the
13 witness list that you're going to see on the 12th,
14 does that get you pretty close to where you need to
15 be to get ready for this trial?

16 MS. SIRIGNANO: Judge, I filed Document
17 1526, that was the opposed motion in limine.

18 THE COURT: That's the one in front of me.

19 MS. SIRIGNANO: Just for the record, Judge.

20 Quite honestly, Judge, you know, if I had
21 my druthers, I would request that we got this updated
22 witness list sooner than later, only because I think
23 all of us in good faith filed our witness lists,
24 which were realistic in nature. And I know the
25 Government's position was that you asked them to be

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1 overinclusive. And that's something that's been
 2 repeated a couple of times here. And I understand
 3 that. But if you do the math, Judge, a six-week
 4 trial, that's 240 hours total time. And they have
 5 listed 274 potential witnesses. And so I just want
 6 everybody to realize that all the defense teams are
 7 spending incredible amounts of CJA funds trying to
 8 figure out who these 274 people are. So it's
 9 unfortunate that we have to keep plowing through all
 10 of the investigation, the defense investigation, the
 11 costs, and then wait until January 12.

12 I do like your proposal of will call
 13 witnesses, may call, and then rebuttal, I agree with
 14 you could be zero, or maybe one or so. But my
 15 request would be to perhaps amend the scheduling
 16 order so we can do what we need to do for trial, and
 17 not waste our resources going through all of these
 18 proposed names, and really focus on the ones that
 19 we're going to be dealing with at trial.

20 Thank you, Judge.

21 THE COURT: Thank you, Ms. Sirignano.

22 Any other defendants have any thoughts on
 23 the proposal I'm putting out there to address this
 24 updated witness list? Mr. Adams?

25 MR. ADAMS: Sorry to double-team.

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1 THE COURT: You're already tag-teaming.
2
3 MR. ADAMS: I think that only applied to
4 trial is the way I heard that. Judge, the only -- I
5 love the idea of narrowing it down. And obviously, I
6 agree with Ms. Sirignano, if they have a pretty good
7 handle on who their people are, I would hope they
8 wouldn't wait till January 12 to provide it, and they
9 could go ahead and do that in good faith, so we can
10 push to be ready. Earlier, we had talked about
11 allowing them to re-call people due to the
12 narratives, and they're wanting to have things be
13 more seamless. If they could just asterisk those
14 people who they intend to call more than once, to the
15 best of their knowledge, that would certainly help us
be on the same page with them as we move forward.

16 THE COURT: All right. Any other
17 defendants that have any thoughts on this updated
18 witness list. My proposal okay?

19 All right. Let me ask you, Ms. Armijo, do
20 you have -- I forgot what the 12th is. Let's see, is
21 that a Wednesday?

22 MS. ARMIJO: I believe that's a Friday.

1 MS. ARMIJO: I think it's difficult.
2 Because next week, of course, is the holiday. I know
3 that there is a few of us at this table that have use
4 or lose that we're already going to be missing out.
5 The following week, we are talking about hearings,
6 scheduling the week of January 8. We don't know what
7 that looks at. It leaves very little time for us to
8 do it. And let's remember why we had that first
9 list. It was because we were getting into Brady,
10 Giglio, and the defense was hammering down: We need
11 to know who they're calling. We want this, that, and
12 the other. So they've already had the luxury of one
13 list, which was purposely overinclusive.

14 This scheduling order was filed July 7 of
15 2017. So it's not really fair for the defense to now
16 cry, and try and go back on it. This scheduling
17 order applies to both parties. We're willing to do
18 what the Court asked, instead of just narrowing it
19 down to 100 people, to do the dividing and everything
20 else. But I don't think at this point, with all of
21 the discovery that we still have to get out and that
22 we're working on, for us to go back just for
23 convenience of the defense. This was agreed upon,
24 and we would like to stick with January 12.

25 THE COURT: Do you have any problem with

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1 the asterisk -- putting the asterisk next to the
2 witnesses that you think at this time you're going to
3 be calling, and maybe several times in your trial?

4 MS. ARMIJO: No, we have no problem with
5 that.

6 THE COURT: How many asterisks does Mr.
7 Acee get?

8 MS. ARMIJO: He'll be a five asterisk
9 person.

10 THE COURT: All right. Anything else you
11 want to say on this updated witness list, Ms. Armijo?

12 MS. ARMIJO: No, Your Honor.

13 THE COURT: All right. Ms. Sirignano.

14 MS. SIRIGNANO: Judge, I'm trying to
15 respond to that statement that we're trying to change
16 everything at the last minute after the scheduling
17 order has been in place. Quite frankly, if we had
18 gotten useful witness lists the first time around, we
19 wouldn't be asking for something that's actually
20 workable. What we don't have is workable. Based on
21 information and belief, there is a deceased person on
22 the Government's witness list.

23 THE COURT: It's New Mexico.

24 MS. SIRIGNANO: Hey. And I understand
25 they've got use or lose. I was a Government employee

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1 for 15 years. My client is looking at a lot of time.
2 And they charged this case. I understand them being
3 overinclusive. But it's kind of abusive, 247
4 potential witnesses. I'm not asking for the name of
5 every single person that they're going to call
6 tomorrow. We're all going to be here after the
7 holidays. And I think, you know, 35 -- will call 35
8 names, they could probably skim that off of their 274
9 person witness list, and send it out in an email
10 before the 12th, and if they want to finalize
11 something later.

12 But I just think that the amount of money
13 that's being wasted on finding people that aren't on
14 police reports, that have nothing to do with this
15 Molina or this alleged Marcantel thing, is just an
16 incredible exercise in futility for all of us. And,
17 frankly, I'd like to get it sooner than later, so we
18 can focus on something else, Judge. And it's not
19 that I'm trying to intentionally, you know, move the
20 scheduling order. That's fine. But I don't think
21 that we're asking for a lot; 35 names at the will
22 call, and this way we know who they're definitely
23 going to call, and we can move forward and address
24 something else.

25 Thank you, Judge.

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1 THE COURT: All right. Thank you, Ms.
2 Sirignano.

3 Anything else, Ms. Armijo, on the updated
4 witness list?

5 MS. ARMIJO: Well, it's not something that
6 we can just easily put together. It's something that
7 all the parties need to be together. And even though
8 I said that we'd be taking off, I'm sure we're all
9 going to be working, but in different parts -- in
10 different states, in different cities. So it's not
11 something that the trial team can do necessarily the
12 day after Christmas. So we would simply request,
13 again, that we follow the scheduling order.

14 And again, I can't emphasize enough that we
15 were told to be overinclusive. And we did go through
16 the Molina discovery, the Santistevan. The counts
17 that are going to trial is where we got names from
18 that list. So it's not like we were pulling from a
19 lot of other things. And it's not worthless, because
20 as the Court knows, there is enterprise witnesses and
21 things like that. So it's not something that is
22 easily done.

23 THE COURT: All right. Well, I'm going to
24 order that the updated witness list -- this is more
25 directed to the Government, but it applies to

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1 everybody -- will have, for the Government, a maximum
2 of 35 names as the will call. And I encourage the
3 Government, if they don't think they have 35, don't
4 feel like you have to fill that up, so, if you don't
5 need it, if it's closer to 30, try to make it as
6 realistic as possible. Because the more that the
7 defendants have to prepare for, the more difficult it
8 is for them. And it is more costly.

9 On the may call, then those, again, I hope
10 that the Government will try to eliminate names at
11 this point. I'll leave the January 12 deadline in it
12 to try to make sure that we don't rush this, and
13 we're looking at as realistic a list as possible.
14 And I'm hoping and anticipating that it will be much
15 less than 210 witnesses. It will be something way
16 reduced on both will call and the may call side. And
17 then there will be an asterisk next to the names of
18 the witnesses on the will call that the Government
19 anticipates may be called multiple times. But I'll
20 leave the schedule in place.

21 All right. Let me go back to you, Ms.
22 Sirignano. You had another request, and a couple
23 more requests in this motion, assessment of all
24 Government witnesses. What are you looking for
25 there? Is there something else you're wanting here,

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1 or are we -- I know it may not have worked out just
2 the way you wanted it. But have I handled everything
3 that's in 1526, or is there something else that you
4 need?

5 MS. SIRIGNANO: Judge, that was just
6 included in there as argument because of the 274
7 witnesses, including the dead guy that they were --
8 that the witnesses were going to be admissible and
9 they were going to be relevant to trial based the
10 rules of evidence. I can -- we can wait to get the
11 updated witness list and make any argument after the
12 fact. Because right now, it doesn't make sense to do
13 that.

14 THE COURT: You also have a title in
15 discussion in the brief, or in the motion about voir
16 dire of all Government expert witnesses. Is there
17 anything else on that line that you need or want
18 today, or have we covered it all with the Court's
19 ruling?

20 MS. SIRIGNANO: I think we covered it all
21 already, Your Honor. Thank you.

22 THE COURT: All right. So I will grant in
23 part and deny in part 1526 of the defendant's motion
24 on the updated list.

25 Let me drop down to Anthony Ray Baca's

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1 motion 1537. Let me just see if we can clean that up
2 a little bit. This is the one where he's asking that
3 the Government attorneys or witnesses not refer to
4 the alleged victims as victims. Let me sort of give
5 my thoughts on this. And I've done similar things in
6 the past, if not specifically. And you may be able
7 to find an opinion I've written on this subject.
8 Generally, I consider the word "victim" to be
9 argumentative. So I would prohibit that in the
10 opening statement or the Government using that word
11 in questions, and would ask the Government's lawyers
12 not to -- or to counsel and direct their witnesses
13 not to use that word. I think it's better if you
14 just use names. So if the alleged victims that we're
15 talking about are going to be people like Marcantel,
16 and people like that, that we just use names. Tell
17 yourself to use names in the -- in your openings, use
18 names in your questioning, use names in your witness'
19 responses.

20 At closing, I do consider it proper for you
21 to characterize the evidence and call them victims.
22 And you can argue that they were victims, and use
23 that word.

24 Mr. Lowry, it's your motion. Is where I'm
25 drawing the line acceptable to you or are there any

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1 other -- Ms. Duncan?

2 MS. DUNCAN: Yes, Your Honor. That is
3 fair.

4 THE COURT: Any other defendants have
5 anything they want to say on that before I hear from
6 the Government?

7 All right. Can the Government live with
8 that line, Ms. Armijo?

9 MS. ARMIJO: Yes, Your Honor.

10 THE COURT: All right. So that will take
11 care of 1537.

12 All right. Then let's pull out motion
13 1530. I believe that's Mr. Sanchez' motion in limine
14 on bad acts. What I would propose to do on these is
15 start plowing through using the letter that Ms.
16 Armijo sent to Mr. Jewkes and Ms. Jacks. Just take
17 these one at a time. I guess I'll be looking, first
18 of all, from the Government to sort of tell me what
19 they intended to -- what they intend to use the
20 information for, if they are using the information
21 for establishing the enterprise, or that this was a
22 crime or bad act that was committed in furtherance of
23 the enterprise. If they're not going to try to do
24 with that evidence, then if it's just a bad act or a
25 crime, and they're using it for some other purpose

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1 that is permissible under 404(b), they identify what
2 that purpose is.

3 Then I'll look to the defendant,
4 Mr. Jewkes, Ms. Jacks, to tell me what you think is
5 wrong with the Government's arguments of why it
6 should be admitted into evidence. And then I guess
7 I'll make rulings on these one at a time.

8 Let me give Ms. Bean a break, and I'll hear
9 from you right after the break. Let's get -- let's
10 everybody take a break for about 15 minutes, and then
11 we'll come back and get started going through these
12 one at a time.

13 MR. BENJAMIN: Could I confirm, we are here
14 tomorrow; correct?

15 THE COURT: As far as I know. If you want
16 to talk to Ms. Wild, go ahead. But as far as I know,
17 I'm working through 5:30 tomorrow, and I'm driving
18 back tomorrow, and I have criminal stuff in
19 Albuquerque on Thursday morning. That's a schedule I
20 am operating under.

21 All right. We'll see you after the break.

22 MR. JEWKES: After the break, I'll ask the
23 Court a question.

24 (The Court stood in recess.)

25 THE COURT: All right. Let's go back on

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1 the record. Everybody got an attorney? Look around,
2 make sure everybody has got an attorney.

3 All right. Mr. Jewkes, you had some
4 comments you wanted to make on your motion.

5 MR. CASTELLANO: Your Honor, before
6 Mr. Jewkes begins, I just have a scheduling question.
7 Does the Court know when it's going to hear Document
8 1325? That is Mr. Baca's motion to suppress coerced
9 statements anticipated testimony. We've had, since
10 yesterday, Agent Brusuelas from the FBI come from
11 Albuquerque.

12 THE COURT: I'm sorry.

13 MR. CASTELLANO: That's okay. I didn't let
14 the Court know earlier.

15 THE COURT: Which motion is that?

16 MR. CASTELLANO: It's Document 1325.

17 THE CLERK: You don't have it, Judge,
18 because it's not something we didn't know for sure
19 would be taken up. And it's something I just spoke
20 with Ms. Armijo about.

21 THE COURT: Well, what do you think? I
22 take it that you would like to get that witness on;
23 is that what you're raising it for, Mr. Castellano?

24 MR. CASTELLANO: We would, Your Honor, so
25 she can get back to Albuquerque.

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1 THE COURT: Does that mess anything up from
2 your standpoint, Ms. Wild?

3 THE CLERK: No, other than it's a little
4 bit different than the agreement and the discussion I
5 just had with Ms. Armijo in coordinating with counsel
6 for the defense. But if everyone is on board, I
7 don't see it as a problem.

8 THE COURT: Does anybody from the defense
9 side have a problem with getting the Government's
10 witness testimony taken and getting out of here?

11 MR. CASTELLANO: Your Honor, if it's a
12 problem -- I understand the Court doesn't have it
13 scheduled for today. We could probably put her on
14 tomorrow maybe first thing, and get her back. I'm
15 not trying to mess with the schedule too much.

16 THE COURT: So I don't have it written
17 down, this is Mr. Baca's motion to suppress?

18 MR. CASTELLANO: It is, Your Honor.

19 THE COURT: How about you, Ms. Duncan? Do
20 you have any problem with taking this witness up now?

21 MS. DUNCAN: Your Honor, we'd ask that we
22 take her up first thing in the morning and not now.
23 I'm not ready to do her this afternoon. But I could
24 be ready first thing in the morning.

25 MR. CASTELLANO: That's fine with us, Your

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1 Honor. I just wanted to make sure it was on the
2 Court's schedule.

3 THE COURT: Okay. It wasn't. But sounds
4 like, if nobody has any objection, we'll take the
5 witness up first thing in the morning then.

6 MR. CASTELLANO: With your permission, may
7 I release her for the day, Your Honor?

8 THE COURT: Any objection, Ms. Duncan?

9 MS. DUNCAN: No, Your Honor.

10 THE COURT: Anybody else? All right.
11 She's released for the day then.

12 MR. CASTELLANO: I'll be right back.

13 THE COURT: Mr. Jewkes, you had some
14 comments you wanted to make on your motion.

15 MR. JEWKES: Yes, sir. But I do have a
16 housekeeping matter to begin with. In the morning I
17 have two sentencing hearings in front of Judge
18 Gonzales upstairs. So if I can duck out of here
19 about 9:45, take care of business, I will be back,
20 and of course, Ms. Jacks will be here --

21 THE COURT: All right.

22 MR. JEWKES: -- to take care of Mr.
23 Sanchez.

24 THE COURT: That's fine.

25 MR. JEWKES: Your Honor, may it please the

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1 Court. We filed Document 1530. We complain about
2 the Government's notice of their intended use of
3 alleged bad acts, which is 404(b) evidence. And,
4 Your Honor, Appendix A, which was provided to us,
5 lists 27 acts. And by the way, that's attached to
6 the motions. That began in 1992, with Mr. Sanchez'
7 conviction in Valencia County for murder, and then
8 goes on to culminate in the March 7, 2014 incident
9 involving Javier Molina, the subject of Counts 6 and
10 7 of the case before the Court. We're talking about
11 a span of 22 years.

12 Your Honor, as we pointed out in the
13 motion, the guiding rule here, of course, is rule
14 404(b) of the Federal Rules of Evidence. It has to
15 do with prohibited use. Evidence of a crime or a
16 wrong or other act that's not admissible to prove the
17 person's character, in order to show that on a
18 particular occasion the person acted in accordance
19 with that character.

20 Your Honor, the Court brought this up, oh,
21 I don't know, a couple hours ago, that basically the
22 problem is, the Government, in order to meet their
23 burden, must establish a link between the bad act,
24 and link it to the enterprise. And to do that, what
25 they're going to have to show is that it's

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1 relevant -- the bad act, that is -- to establish any
2 one of those elements that we find in 404(b), which
3 can be intent and knowledge, motive, preparation,
4 plan, or absence of mistake. And at the same time,
5 has to show a logical connection between the alleged
6 bad act and the trial before the Court.

7 One last thing, Your Honor. The Government
8 bears the burden of proving just how the proffered
9 act is relevant to an issue in the case before the
10 Court. And, as I said, they noticed us with 27 acts.
11 The first act being November 22, 1992, Daniel Sanchez
12 committed murder in the first degree. We would argue
13 to the Court, Your Honor, that they have not
14 established -- they've not notified us as to what is
15 the nexus between this and the alleged enterprise.
16 In other words, how is it relevant to this case?

17 Should we take things one by one, to let
18 the Government respond, Your Honor, or how do you
19 want to do it?

20 THE COURT: Yeah, I think that probably
21 what I'd like to do is have the Government lead off,
22 since they are the proponent of the evidence, and
23 see -- let me ask them some questions about it. And
24 then I'll hear from you, and you can tell me more
25 that I don't know about what the bad act is. And

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1 then if you have some questions of the Government
2 that you'd like to ask through me, I'll be interested
3 in those.

4 MR. JEWKES: Very well, Your Honor.

5 THE COURT: Thank you, Mr. Jewkes.

6 All right. So I guess the two questions I
7 will probably be asking -- I mentioned these a little
8 bit earlier -- on each one of these, Mr. Castellano,
9 and you can tell me anything about them you want --
10 some of these I can probably figure out what they
11 are; others I may not. So I'm not trying to restrict
12 you in any way. But the two questions I'll probably
13 be looking at is this what you think of as 404(b)
14 evidence? And we're answering that in probably two
15 ways. Tell me, is this what I would call enterprise
16 res gestae, furtherance of the enterprise, or is it a
17 true bad act or crime that you're using to show one
18 of the 404(b) purposes? So on each one of these I
19 have those two questions. And then, if it is 404(b)
20 evidence, what is the proper purpose that the
21 Government thinks it's invoking with this evidence.

22 MR. CASTELLANO: And I looked over each of
23 these last night. And I may be able to answer some
24 of the Court's questions, and I may not be able to
25 answer others. Each of these allegations is

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1 supported by documentation. And so, over the night
2 last night, I wasn't able to pull the documents which
3 substantiated each of these allegations. My short
4 answer is I think none of this is 404(b).

5 THE COURT: So your position is you're
6 either going to tie it to enterprise, furtherance of
7 the enterprise. I can't think anything else what it
8 would be. Maybe res gestae. But it's going to be
9 enterprise, furtherance of the enterprise, or it's
10 not coming in for any exception under 404(b); is that
11 fair?

12 MR. CASTELLANO: It is fair, Your Honor.
13 And I didn't get a chance to do this with each of the
14 letters, but I did with Mr. Sanchez' over the break,
15 if you look in the right hand column, I have OA 11,
16 12, and 13, and numbers going down the page. Those
17 are overt acts. Each of those acts is actually
18 charged in the RICO indictment, which is 16-CR-1613.

19 THE COURT: So on these is particular acts,
20 these are actually alleged in the indictment, if I go
21 to those counts?

22 MR. CASTELLANO: That's correct. In
23 16-1613, which is the RICO indictment. With the
24 exception of the 1992 charge --

25 THE COURT: Are you able to make this

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1 portion just bigger on your screen? Thank you.

2 MR. CASTELLANO: So, with the exception of
3 the 1992 charge, every one of these is an
4 allegation -- it's an Overt Act in the RICO,
5 conspiracy charged in a separate case.

6 THE COURT: If you were to turn the page,
7 would it be the same way?

8 MR. CASTELLANO: Yes, sir. I can display
9 that for the Court. Like I said, I was only able to
10 do this one over the break.

11 THE COURT: What are the letters in front?

12 MR. CASTELLANO: The OA stands for overt
13 acts.

14 THE COURT: Oh. Did you have those on the
15 front page?

16 MR. CASTELLANO: I did, Your Honor.

17 THE COURT: Okay. I thought those were
18 just numbers. Okay.

19 Would you push it up a little bit? All
20 right. If you want to go to the next page.

21 MR. CASTELLANO: On this page I struck one,
22 which was the one that mentions the date of the
23 February 24, 2012.

24 THE COURT: So you will not be seeking to
25 introduce that bad act?

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1 MR. CASTELLANO: No, Your Honor. If I
2 remember correctly, I think when we superseded, we
3 may have removed that act, now that I went back and
4 double checked.

5 THE COURT: All right. Let me ask you
6 this: You can tell me anything you want on these,
7 but when you were charging the overt acts in the
8 indictment, what was your philosophy, thinking, why
9 did you use those to charge in the indictment?

10 MR. CASTELLANO: In the RICO indictment,
11 the purpose was to establish for purposes of a
12 racketeering conspiracy, that each of these
13 individuals in that indictment conspired, or -- there
14 is a conspiracy with one or more other people to
15 violate the RICO Act. So these would all be an
16 indication of a conspiracy to commit racketeering
17 acts in furtherance of the enterprise.

18 THE COURT: So I take it from that answer
19 that during the entire timeframe that's used, I guess
20 the earliest one that's an Overt Act is going to be
21 1994. During that entire time Mr. Sanchez was,
22 according to the Government, a member of the SNM
23 Gang?

24 MR. CASTELLANO: I believe that's correct,
25 Your Honor. The one issue I have with not having

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1 supporting documentation is I won't be able to recall
2 when each of these individuals entered the SNM Gang.
3 So, for example, in 1992, I don't believe that Mr.
4 Sanchez was a member of the SNM. But the reason
5 that's included is that for purposes of recruiting
6 for the SNM, things like pedigree, and the
7 willingness to put in work for the gang is something
8 that the gang looks for when they're recruiting
9 members. So if someone comes into prison with a
10 murder, that's somebody who they may be interested
11 in, knowing that someone is willing to take a life.

12 So we are actually moving the admission of
13 that as well.

14 THE COURT: I guess I understood that, if
15 somebody did something to advance their position
16 within the enterprise, or to become a member of the
17 enterprise, that would probably fall within the
18 furtherance or evidence of the enterprise. But if he
19 just committed a murder, and that's all we have, we
20 don't have any evidence that he was doing it for
21 purposes of advancing the enterprise or becoming a
22 member of the SNM Gang, what would be your pitch for
23 why that should come in?

24 MR. CASTELLANO: For the reason I stated.
25 I believe that some of the cooperators know Mr.

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1 Sanchez to have a murder conviction. That's
2 something they talk about amongst themselves. It's
3 something that establishes that someone is willing to
4 prove themselves for the gang. But I do agree with
5 the Court's question, or I think the Court is asking
6 the right question.

7 THE COURT: Seems like that's part of his
8 resume. He's got a resume; doesn't matter how he got
9 it, but if he didn't put that thing on his resume to
10 try to get into the gang, or advance the gang, it
11 seems to me it's not going to fall within the
12 enterprise evidence.

13 MR. CASTELLANO: I agree with that
14 statement, Your Honor. I use the term "pedigree." I
15 think resume is another word for that.

16 And I will state I don't believe we could
17 establish that, in 1992, Mr. Sanchez committed that
18 murder for the purpose of entering the enterprise.
19 So I don't think it would fit the elements in that
20 way.

21 THE COURT: Do you feel like on the
22 others -- and you must have taken this to the Grand
23 Jury; the Grand Jury found probable cause on these
24 overt acts. Did the Grand Jury hear testimony about
25 tying Mr. Sanchez or tying these bad acts and crimes

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1 to the enterprise for each one of the overt acts?

2 MR. CASTELLANO: I don't remember the
3 specific Grand Jury testimony. But, yes, that would
4 have been the purpose, was that we would have tried
5 to establish for the Grand Jury these things were
6 done for the purpose of establishing a racketeering
7 conspiracy.

8 THE COURT: And is that your intent at
9 trial is to take each one of these overt acts? And
10 do you have the evidence to tie these acts to the
11 enterprise, and that they were done in furtherance of
12 the enterprise?

13 MR. CASTELLANO: Yes, Your Honor. Now, the
14 first question is admissibility. And that's the
15 first question you want to ask. The second is
16 whether we truly want to introduce each of these at
17 trial. I can tell the Court, like I said, each of
18 these is based on documentation. So once we decide
19 which ones we want to introduce at trial, we would
20 make sure we had a witness. And if we didn't, then,
21 obviously, it wouldn't come in.

22 But this is for the purpose of the Court
23 noting that they're admissible for trial purposes.

24 THE COURT: All right. Tell me what I also
25 ought to be asking you to try to determine whether

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1 you are meeting your requirements to get this in for
2 enterprise or furtherance of enterprise activity.

3 MR. CASTELLANO: I may be able to answer
4 that with the Harris case I mentioned earlier. I'll
5 show the Court two portions from that decision. The
6 first is that an association-in-fact enterprise, here
7 at the top of the page, need not have a hierarchical
8 structure or chain of command. Decisions may be made
9 on an ad hoc basis, and by any other number of
10 methods, by majority vote consensus and show of
11 strength, et cetera. Members of the group may not
12 have fixed roles. Different members may perform
13 different roles at different times. The group need
14 not have a name, regular meetings, dues, established
15 rules and regulations, disciplinary procedures, or
16 induction, or initiation ceremonies, nor is the
17 statute limited to groups whose crimes are
18 sophisticated, diverse, complex, or unique. For
19 example, a group that does nothing but engage in
20 extortion through old-fashioned, unsophisticated, and
21 brutal means, may fall squarely within the statute's
22 reach.

23 So one of the things we need to prove --
24 well, I should say three things -- is that the
25 enterprise has a purpose. And in Harris, one of the

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1 purposes of the Crips Gang was drug distribution.
2 Then we have to establish relationships among the
3 members, and then longevity. And I know people talk
4 about the acts covering a number of years. Well,
5 longevity covers that element. And in that case the
6 record showed a pattern of activity that the
7 Government alleged continued over a period of years.
8 So we do have to establish for an association-in-fact
9 enterprise sufficient longevity for the group to meet
10 its purposes. And so when we allege at least acts,
11 it is showing longevity of the gang, long enough for
12 them to basically be a gang.

13 THE COURT: All right. Anything else on
14 these bad acts, Mr. Castellano?

15 MR. CASTELLANO: Not for Mr. Sanchez, Your
16 Honor.

17 THE COURT: Well, let me say this, and I'll
18 start hearing from you, Mr. Jewkes, and other
19 defendants. I'd be inclined not to include, based
20 upon what I'm hearing, the first one about Mr.
21 Sanchez committed murder in the first degree in 1992.
22 I'm not seeing enough link there just between items
23 on a resume or pedigree and the enterprise. There
24 may be some other reason it comes in, but -- such as
25 he takes the stand, and a conviction or something.

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1 I'd have to rethink that. But at least for purposes
2 of either the Government is not trying to use 404(b),
3 so that's out. So if it's coming in for enterprise,
4 it looks like it wouldn't.

5 The rest of them, based upon the
6 Government's representations, they're not coming in
7 under 404(b). But they'd be coming in for enterprise
8 and for furtherance of the enterprise's activities.

9 So those would be my calls. Your thoughts?

10 MR. JEWKES: Your Honor, that's half the
11 battle. With regard to -- first of all, Your Honor,
12 they allege, if I counted correctly, eight or nine
13 assaults inside prison, either involving correctional
14 officers or other inmates. But we have received no
15 showing that this was in furtherance of the
16 enterprise; in other words, that it was tied to the
17 enterprise. Because I think the Court's going to
18 hear ample evidence that inside prison, these guys
19 don't always get along. It doesn't have anything to
20 do with gang affiliation.

21 THE COURT: You mean, the defendants here,
22 is that what you mean by "guys"?

23 MR. JEWKES: Yes. Personal beefs.

24 So we would argue that we're going to have
25 to have a showing at some point in time with regard

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1 to the remaining 25 overt acts as to how it's going
2 to be tied to the organization.

3 THE COURT: Well, stop right there. And
4 let me ask Mr. Castellano a couple of questions here.
5 I don't want to turn this into more difficult than it
6 has to be. I mean, this is -- since it's not a
7 404(b) and that's out the window, we're just talking
8 about regular evidence in a trial. But can you think
9 of a way, Mr. Castellano, that before you talk about
10 one of these bad acts, or crimes, is there a way for
11 you to put on your evidence so that I can see what's
12 about to come, so I can hear the evidence of
13 enterprise and furtherance of the enterprise before
14 you actually get the bad act in, so that Mr. Jewkes
15 and I can be listening to it? And then -- you know,
16 if it looks like he laid the foundation, we're just
17 going to keep moving. But if we don't have the
18 evidence, I'm taking you at your word that you have
19 it. I assume you do. But before you blurt out these
20 things in trial, or a witness does, I'd like to hear
21 the evidence in furtherance before I hear it.

22 Can you think of a way to do that? Because
23 once the bell is rung, it's hard to unring it.

24 MR. CASTELLANO: I'm trying to figure out
25 how best to answer that question. Because the

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1 indictment alleges, among other things, that the gang
2 rules the prison system by force and by fear and
3 intimidation. And so I'm not sure that every act
4 would be considered in furtherance of membership in
5 the gang. It could be. For example, one of the
6 intent requirements under VICAR is that you do
7 something in furtherance of the gang, and that also
8 means -- the cases law tells us you do it because
9 it's expected of you by virtue of your membership in
10 the gang. So if you're disrespected, then that would
11 result in responding to somebody who disrespects you,
12 which would include guards or other inmates. So --

13 THE COURT: Let me try this -- let me try
14 this and see -- I don't want make this more
15 complicated than it has to be. But I also am trying
16 to figure out the way that the Court and the
17 defendants have a meaningful ability to object, if
18 they don't feel like the nexus is there, because this
19 is the kind of evidence that once it's out, you just
20 can't put it back in. Sometimes nexus falls apart
21 and you can't fix it.

22 Would you be able to do this: You said at
23 some point -- you're probably not going to put in all
24 these acts; at some point you're going to know
25 whether you are going to put in the acts. You said

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1 you hadn't had a chance to look at the documents, and
2 that's probably what's going to drive it. Would you
3 be willing that, at the point you're ready to
4 determine which overt acts you're going to prove up
5 at trial, and you're going to be looking at the
6 documents as you go through, would you be willing to
7 send a letter to Mr. Jewkes, and say: Here's the
8 documents I'm going to be relying on, and these are
9 the overt acts I'm going to prove. And then, at that
10 point, Mr. Jewkes can be looking at them, and you
11 know, he can make a call. It's like, Yeah, this is
12 coming in, the judge is going to let it in, or there
13 is not enough here for them to prove the nexus, so
14 I'm going to fight him on that one and object at
15 trial. And if need be, you know, somebody could send
16 me a letter and send me the documents you're relying
17 on, too, and tell me how you're going to do it.

18 The reason I'm thinking that might be a
19 minimal burden, is that's something you're going to
20 do eventually yourself anyway. And the only thing
21 I'm adding to it is when you do it, tell Mr. Jewkes
22 so that he can figure out whether to object. And if
23 you do, then Mr. Jewkes, since I'm putting one burden
24 on the Government here, I put the burden on you to
25 send me a letter and send me the documents and tell

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1 me that you don't think that ought to come. And I'll
2 try to be alert during the trial to the objection.

3 Do you think y'all could live with that?

4 MR. CASTELLANO: I'm willing to give that a
5 try, Your Honor. And if I can generate a shorter
6 list beforehand, indicating that I intend not to use
7 something, I'll try to let Mr. Jewkes know that. And
8 then I'll try to focus on the other ones that we're
9 either thinking about, or moving towards admission.
10 But if I can shorten that list, then we'll try to do
11 that.

12 THE COURT: Okay. I don't think I can
13 think of a better solution as to how to deal with
14 this. I think, generally, if the Government thinks
15 that -- I mean, if they went to the trouble of
16 putting it as an Overt Act, that's a pretty
17 substantial step. So I assume they have some
18 evidence to back that up. Remember, it only has to
19 be relevant. So the standard is pretty low here. I
20 mean, if it has any tendency to make the statement
21 true; in other words, that it establishes the
22 enterprise, or is in furtherance of the enterprise,
23 it's not a call I make by a preponderance of the
24 evidence. It's simply, is it relevant? And if
25 they've got enough there to allow a reasonable juror

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1 to infer from that evidence, then it's probably not
2 my -- I don't have a gatekeeping function here.

3 What do you think, Mr. Jewkes?

4 MR. JEWKES: Yes, sir. I think we can live
5 with that. What type of deadline did you have in
6 mind?

7 THE COURT: Well, I'd be inclined not to
8 impose a deadline here. Because this is a little bit
9 unusual, and just try to protect the defendants from
10 having it blurred out at trial. I think we're going
11 to have to make some calls as we go.

12 I don't know. How do you feel,
13 Mr. Castellano? Is this something that you're going
14 to do sooner rather than later?

15 MR. CASTELLANO: It's something I'd rather
16 do later. Because, obviously, we'll be doing this
17 potentially for five defendants, depending upon how
18 the Court rules, in addition to everything else we'll
19 be doing as we march towards trial. I'll certainly
20 try not to spring this on them last second, so
21 they're scrambling.

22 THE COURT: If you were to propose a
23 deadline, what would it be?

24 MR. CASTELLANO: Let me check the calendar,
25 Your Honor.

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1 THE COURT: January 2, 8, 15, 22, 29 are
2 our Mondays.

3 MR. CASTELLANO: How about the 22nd, a week
4 before trial?

5 THE COURT: Okay. And then, Mr. Jewkes,
6 you're experienced, you can look at it and see if
7 there are some there that you really want to fight.
8 And if there are, I'll put the burden on you to send
9 me a letter or something, and then I'll look at it.
10 I'll just have to make balls and strikes on it and
11 say whether it's relevant or not. Because I think
12 that's the standard at this point, is whether it has
13 any tendency to make what the Government is trying to
14 prove more likely than not.

15 MR. JEWKES: Very well, Your Honor.

16 THE COURT: Anything else on your motion?

17 MR. JEWKES: No, sir.

18 THE COURT: All right. Anything else you
19 want to say? I kind of chopped it up, Mr.
20 Castellano.

21 MR. CASTELLANO: No, Your Honor.

22 THE COURT: All right. Anybody else want
23 to comment on this: I've probably got some more of
24 these coming up, so if anybody wants to comment on
25 what we're doing because, once you do one of these,

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1 you fall into a pattern.

2 Ms. Duncan?

3 MS. DUNCAN: Your Honor, I'll address the
4 individual issues as to Mr. Baca in a moment. But
5 the January 22 deadline, that just feels to me way
6 too close to trial. I know from my letter, I've got
7 four whole pages of proposed bad acts against Mr.
8 Baca. And I'm going to be prepping for actual trial
9 instead of having to brief all this in that week,
10 that already very busy week.

11 THE COURT: Don't feel like you have to
12 brief it. I mean, really, just give me the basic
13 documents, and tell me this is one of the ones you're
14 objecting on. Because, you know, the way I'm
15 envisioning this, I'm going to make calls, like I
16 would if they were just doing in this trial, you
17 know. So you make them the best you can. And
18 remember, the standard is extremely low. And it is
19 not a Daubert hearing, it's not a James hearing.
20 This is a relevancy hearing. And so they don't have
21 to have much.

22 MS. DUNCAN: And I appreciate that. I
23 just -- I guess for my client, the 404(b) notice the
24 Government gave us, the first one, is alleged to have
25 happened in August of 1982. And the last one is

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1 alleged to have happened in November 30 of 2015. And
2 you know, we're not objecting. We acknowledge that
3 some of these alleged bad acts are part of the
4 enterprise evidence. But there is others -- for
5 example, the 1982 stuff that's just totally
6 irrelevant.

7 THE COURT: Let's see what Mr. Castellano
8 says in a moment about Baca. If he takes the same
9 position that none of it is 404(b) evidence, he's not
10 going to use 404(b), we can put that aside, and that
11 may give you some comfort.

12 MS. DUNCAN: It may give me some I think.
13 And I agree I could just argue on the points. But
14 the evidence they're proposing to use, whether it's
15 404(b), or alleged enterprise evidence, is highly
16 prejudicial against my client.

17 THE COURT: Let's see what he says. He may
18 get up and say he's not going to try to bring any of
19 it under 404(b). Remember, this device got done to
20 make sure that the defendants got to object to 404(b)
21 evidence. It's working. That's all I'm saying.
22 It's working. It's not fun. But it's working. So.

23 MS. DUNCAN: Thank you, Your Honor.

24 THE COURT: Hold on. I'm not cutting you
25 off. But I'm thinking anybody wants to say anything

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1 sort of about what they just saw with the Government
2 and Mr. Sanchez?

3 Were you up, Ms. Sirignano?

4 MS. SIRIGNANO: If we're going to do this
5 for each defendant --

6 THE COURT: I am. But if you've got
7 something on what you just saw, go ahead and tell me.

8 MS. SIRIGNANO: Well, my objection would be
9 evidentiary in nature, and tying it into the
10 enterprise. I talked with the Government before our
11 break, and was told that it's going to be all
12 enterprise evidence instead of 404(b) evidence. But
13 I don't know how all this is going to come in, either
14 through co-conspirator statements, or with prior
15 convictions. They're not related to the alleged SNM
16 enterprise. And while I do agree that some may be
17 alleged to -- or some of them may be enterprise
18 evidence, I can't concede that all 40 of them, four
19 pages' worth, starting from 1995, going all the way
20 through --

21 THE COURT: All right. Let's hold those
22 thoughts, because I think those are specific to
23 Mr. Garcia. So let's hold those.

24 MS. SIRIGNANO: Thank you, Judge.

25 THE COURT: Anything else then?

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1 All right. So that's how we'll deal with
2 Mr. Sanchez' motion in limine on the bad acts.

3 So the next one I had up was for
4 Christopher Chavez. So I'll think we'll put it
5 aside. Are you in agreement on that?

6 MR. MONDRAGON: Yes, Your Honor.

7 THE COURT: We'll put it aside.

8 I'm putting Mr. Patterson's aside. So
9 we'll take it up the second trial.

10 All right. Ms. Duncan, why don't we take
11 up your motion. Did you have a chance to talk to Mr.
12 Castellano about your motion, what positions he's
13 going to take? Or do you want to let him talk a
14 little bit to see if we can -- I'm not seeing Mr.
15 Baca's motion. I know I read it.

16 MS. DUNCAN: Your Honor, I haven't had an
17 opportunity to speak with Mr. Castellano. So I'm
18 hoping he can put his position on the record.

19 THE COURT: Okay. Let me see if I can find
20 it first, here.

21 All right. Mr. Castellano, on Document
22 1538, any preliminary remarks that you want to make?
23 I guess the first question is, is there anything on
24 your letter here, this attachment, that is going to
25 be 404(b) evidence? Or are you going to do like you

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1 did with Mr. Sanchez, and say, No, I'll not try to
2 get it in as 404(b). We're just going to try to get
3 it in as enterprise or in furtherance of the
4 enterprise?

5 MR. CASTELLANO: Yes, Your Honor, I think
6 we are probably looking at enterprise evidence once
7 again. And I'm looking through the notes --

8 THE COURT: Can I and Ms. Duncan take
9 404(b) then off the table? None of this, the
10 Government will try to get in as 404(b) evidence?

11 MR. CASTELLANO: I think that's correct.
12 If I come across something that I think is otherwise,
13 Your Honor, I'll indicate that.

14 THE COURT: Okay. All right. So do you
15 have -- did you do something similar for Mr. Baca
16 that you did for Mr. Sanchez on overt acts?

17 MR. CASTELLANO: Agent Acee is working on
18 that right now, Your Honor. But I can do some
19 talking, I think, in the interim. Because, if you
20 recall from the James hearing, and I'll just put this
21 up here to refresh the Court's recollection, we went
22 through a number of statements from this kind of
23 summary chart, a report by the FBI. The one I'm
24 showing on the screen is DeLeon 3304. In one of
25 these, I believe that Mr. Baca talks about having

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1 killed another inmate over a drug dispute. I'm just
2 looking for that as I'm talking.

3 THE COURT: Somebody is on the phone
4 dialing, and we can hear everything. So those people
5 on the phone, be real careful about dialing. We're
6 hearing the dialing in the courtroom and hearing
7 other things.

8 MR. CASTELLANO: I can't find it right now,
9 Your Honor. If I come across it, I'll highlight it
10 for the Court. It is related to the acts here.

11 Your Honor, I'm putting on the screen a
12 letter sent by the Government to the defense
13 regarding the prior acts. And I'll go over the easy
14 part first, which is the items that are contained as
15 overt acts in the letter.

16 THE COURT: All right. Have you done this
17 for every page, or is Mr. Acee still doing that?

18 MR. CASTELLANO: He has them all done, with
19 the exception of, I think, just the last couple. I
20 just grabbed it from him, since I knew we were moving
21 forward.

22 THE COURT: Why don't you put the second
23 page up and let me get the overt acts down.

24 MR. CASTELLANO: I'm showing the Court the
25 second page, and I'll move it whenever the Court is

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1 ready.

2 THE COURT: All right. Do you want to go
3 to the next page, page 3?

4 All right. Do you want go to page 4?

5 Okay.

6 MR. CASTELLANO: What I'll do is I'll
7 reference the indictment, and see if I can find those
8 final acts. It looks like the November 29 date is
9 Overt Act 246 in the RICO indictment. And those are
10 related to Gregg Marcantel, so that's actually
11 charged conduct in this case.

12 THE COURT: So that's res gestae, or it's
13 charged conduct?

14 MR. CASTELLANO: It is, Your Honor. That's
15 Overt Acts 246 and 247 from the RICO indictment. So
16 those are the acts we have to prove as charged.

17 THE COURT: Does that apply also to the one
18 for November 30?

19 MR. CASTELLANO: Yes, I think that might be
20 Overt Act 247. I'll double-check. Yes, November 30
21 is Overt Act 247.

22 THE COURT: All right. Now, if I were to
23 ask you the same questions about how you're going to
24 prove these that I asked you in regard to Mr.
25 Sanchez, would your answers be any different?

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1 MR. CASTELLANO: No, it would be the same,
2 Your Honor. What I don't recall here, going back to
3 the items that are not covered by overt acts, is when
4 Mr. Baca became a member of the SNM. So I'd have to
5 go back and check the 1982 to 1988 acts. As I stated
6 earlier, we'll have testimony from some cooperators
7 who will say that they were known by reputation when
8 they reached prison, because they were willing to
9 beat people down, and they were known for that type
10 of activity, so that was used as a recruiting tool.

20 MR. CASTELLANO: Yes, Your Honor. I'm
21 trying to think of -- well, some of these will be
22 pretty clear. So I can give them a heads-up
23 beforehand on some of these. Like I said, some of
24 this is actually charged conduct, then I'll let them
25 know that ahead of time. They should know that

1 that's actually part of the crimes charged.

2 THE COURT: And really I'm doing this as
3 much for myself as them, just so that when I make a
4 ruling, that the bad act is coming in to show
5 enterprise, the furtherance of it, that I feel like
6 I'm making an informed decision. So that's kind of
7 what I'm trying to do is make sure that I'm getting
8 an informed objection, and then making an informed
9 ruling.

10 All right. Anything else, as the proponent
11 of the evidence, you want to say to the Court, Mr.
12 Castellano?

13 MR. CASTELLANO: No, Your Honor.

14 THE COURT: All right. Ms. Duncan, I guess
15 what I would be inclined to do, based upon the record
16 and the representations of the Government, is not
17 allow the first five at the present time, because I
18 don't see sufficient evidence for those coming in.
19 Those seem to me to be resumes or pedigrees that he
20 may have established certain characteristics that
21 would be attractive to the SNM Gang. But they were
22 not yet -- they're not evidence of an enterprise, and
23 they're not yet evidence that he was doing them in
24 furtherance of the enterprise. The others, based
25 upon the representations of the Government, and the

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1 fact that they're pled as overt acts, gives me some
2 comfort that the Government has some evidence that's
3 relevant, and probably would allow the Government to
4 introduce that evidence.

5 MS. DUNCAN: Your Honor, I certainly agree
6 with you about the first five. So all of those
7 offenses, convictions that Mr. Baca has occurred
8 before the Government even alleges he was a member of
9 SNM. Obviously, we contest the Government's
10 representations about his membership in the SNM.
11 Well, we contest really everything in here. But
12 those five clearly are well before the enterprise.

13 For the things after, you know, I have
14 looked at some of the evidence. Some of this are
15 Department of Corrections reports summarizing
16 statements by -- multiple levels of hearsay, so I
17 think the Government is going to have a major proof
18 problem at trial. There are others that summarize
19 conversations Mr. Baca had with informants. And the
20 Government is attributing to Mr. Baca statements that
21 the informants made. There are other acts in here
22 that aren't acts by Mr. Baca at all. For example,
23 I'm assuming Mr. Garcia is going to want speak to
24 this motion, because there are at least three overt
25 acts that are really about Mr. Garcia and not Mr.

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1 Baca.

2 The other thing that's confusing to me
3 about the Government's notice is really starting
4 about on page 2, to the end. These are all
5 predicated on conversations that Mr. Baca had with
6 Eric Duran. And they're pleading the bad acts, or
7 how they want to plead the conspiracy, or the
8 enterprise as things that Mr. Baca said. So it's not
9 really the act itself. It's, rather, we're going to
10 bring in evidence that Mr. Baca said that.

11 So it's a little bit --

12 THE COURT: Give me an example.

13 MS. DUNCAN: So if you look on page 3, for
14 example, it's "On or about October 24, 2015, Anthony
15 Ray Baca stated that he was brought into the gang
16 after he assaulted another inmate on orders from SNM
17 member, Diaz, Sr."

18 THE COURT: Which paragraph is that?

19 MS. DUNCAN: I'm sorry, Your Honor. It's
20 the very first one.

21 THE COURT: First one. Well, I guess, you
22 know -- okay, well, if that's the evidence, if he's
23 taking orders from the SNM -- an SNM member of the
24 gang, then I think that is some evidence that he was
25 doing it for the SNM Gang. People don't usually take

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1 orders from somebody unless they're wanting something
2 in return. So I think it would be some evidence.

3 MS. DUNCAN: Sure, Your Honor. And I agree
4 that with some of these allegations, the Government
5 can prove them up, they would come in as enterprise
6 evidence. And once we know for sure what the
7 Government intends to introduce, we will be filing
8 something to show that the evidence doesn't prove
9 what they say it does.

10 I am given comfort by the Court's ruling
11 that it's going to exclude the first five in the
12 Government's notice, because it's a different
13 character.

14 THE COURT: If Mr. Castellano goes back and
15 he thinks he can prove them up, he'll let you know.
16 But right at the moment, they're not 404(b), so --
17 and I'm not hearing anything that says to me that
18 they're enterprise, or furtherance of the enterprise.
19 If he finds something, he can come back and tell you
20 and me, but --

21 MS. DUNCAN: And I think with the remaining
22 overt acts -- I mean, again, I appreciate Mr.
23 Castellano's representation that he'll let us know
24 sooner than January 22, if they're intending to
25 introduce evidence of one, so that we can prepare.

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1 But I would still ask the Court to move that deadline
2 up a little bit, because it will affect how we
3 present our defense at trial. So the more time that
4 we have to respond and educate the Court, I think the
5 more reliable the ruling will be. But it's the best
6 way to protect Mr. Baca's constitutional rights,
7 because a lot of this evidence is very prejudicial
8 and somewhat tangential.

9 THE COURT: Well, and that's the reason I'm
10 trying to get some information. I'm not inclined to
11 move it up, because I think anything we're getting,
12 you and I, is a gift. It helps me make a more
13 informed decision, and it helps you to formulate an
14 objection. But this is the kind of stuff that, in
15 many trials, you'd just be making like that (snaps
16 fingers.) So I think we better take the gift we got.

17 Anything else, Ms. Duncan?

18 MS. DUNCAN: I have nothing else, Your
19 Honor.

20 THE COURT: All right. Anybody else want
21 to say anything on Mr. Baca's motion in limine to
22 exclude evidence of bad acts turning into enterprise
23 and furtherance of enterprise? Did you have
24 something, Mr. Benjamin?

25 MR. BENJAMIN: No, Your Honor. I was

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1 trying to figure out --

2 THE COURT: Anybody else? Any other
3 defendants?

4 Mr. Castellano?

5 MR. CASTELLANO: Your Honor, I was just
6 trying to match up so the Court has an idea what
7 we're talking about, beginning with the October 24,
8 2015 statement, attributed to Mr. Baca -- I can't
9 read the Bates stamp number, probably 3300 -- this is
10 where it says, "'Pup' explains where he got brought
11 in at the Main, after he piped a guy from Colorado."
12 So this is talking about, I believe, the statement
13 referenced in October 24. So it should be recording
14 rather than just words of Eric Duran. So that should
15 be included.

16 THE COURT: Which paragraph are you looking
17 at, Mr. Castellano?

18 MR. CASTELLANO: Ms. Duncan referred to the
19 top of page 3.

20 THE COURT: Yes.

21 MR. CASTELLANO: October 24, 2015.

22 THE COURT: Okay. All right.

23 MR. CASTELLANO: Talks about how he was
24 brought in.

25 THE COURT: Okay. This is the assault.

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1 And what, then -- what's the evidence show?

2 MR. CASTELLANO: The summary is that Mr.
3 Baca explained where he got brought in at the Main
4 after he quote/unquote "piped a guy from Colorado."
5 So that would be the assault he admits to having
6 committed, so he could be brought into the SNM Gang.

7 THE COURT: And what are we looking at
8 here? What is this evidence?

9 MR. CASTELLANO: These are the summaries we
10 used one or two weeks ago, when we were introducing
11 the James statements.

12 THE COURT: There is some document behind
13 this or some evidence behind this?

14 MR. CASTELLANO: Yes. These are summaries
15 of recordings, and most of these should have
16 transcripts. That's just one of the examples.

17 THE COURT: So this one here is Mr. Baca
18 talking to himself?

19 MR. CASTELLANO: That's correct.

20 THE COURT: Anything else, Ms. Duncan?

21 MS. DUNCAN: No, Your Honor. I mean, we'll
22 obviously argue about evidentiary basis for this at a
23 later time.

24 THE COURT: You don't have to.

25 MS. DUNCAN: I'm going to, though, Your

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1 Honor.

2 THE COURT: All right. So let's move to --
3 I want to stay with Mr. Baca for a while. He's got a
4 series of motions here. And while we're on him, I
5 want to make sure I understand the difference between
6 what we're doing here and what we're doing in these
7 other motions. So let's pick up 1539, which is Mr.
8 Baca's motion in limine to prohibit Government
9 attorneys from using Rule 405, 608, and 609 character
10 evidence without judicial approval.

11 Talk to me about this one. Is this yours,
12 Mr. Lowry?

13 MR. LOWRY: It is, Your Honor. Actually,
14 what we were really seeking here -- I think we filed
15 separate 404(b) motion notices, and I think we heard
16 there will be none. But if you do intend to use any
17 404(b) evidence in the case --

18 THE COURT: I think that the 404(b) issue
19 is now over for this, at least for Mr. Sanchez and
20 Mr. Baca. There is not going to be any 404(b)
21 evidence. If it's going to come in, it's going to
22 have to come in for the relevancy to the enterprise
23 and the furtherance of the enterprise's activities.
24 But it doesn't sound like the Government is going to
25 try to do 404(b) with your client or Mr. Sanchez.

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1 MR. LOWRY: That's correct, Your Honor. I
2 think that's correct.

3 THE COURT: Okay. So then what does this
4 motion do that we haven't done?

5 MR. LOWRY: The only thing it would do is
6 if the defense called character witnesses.

7 THE COURT: Help me think what that would
8 look like. Somebody coming in saying what?

9 MR. LOWRY: It could be --

10 THE COURT: Until Mr. Baca, if and when he
11 takes the stand, is he putting his character in
12 evidence in a way that would allow the Government --

13 MR. LOWRY: Not Mr. Baca. We could call
14 character witnesses to impeach the Government's --

15 THE COURT: You could. But until your
16 case, character is not going to be in evidence --

17 MR. LOWRY: Correct.

18 THE COURT: -- or at play. So what are you
19 fearful of in the case-in-chief?

20 MR. LOWRY: Just actually the use of
21 hypotheticals, like if we put on a witness, for
22 instance, for truthfulness, for instance; the
23 Government might be used -- the case facts and a
24 hypotheticals to challenge their basis of belief that
25 this person was truthful, if you knew this person was

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1 involved in a hypothetical homicide or stabbing or
2 this, that, or the other thing. And really, it's
3 just to prevent that type of hypothetical fact
4 pattern from being so close to the facts of this
5 case. It just brings in -- it's just too close to
6 the quick, if you will, Your Honor. If they could
7 challenge a witness' foundation for their testimony
8 without referring to the facts of this case.

9 And there is Tenth Circuit case -- and
10 frankly, circuit case law across the country,
11 typically comes up in death penalty cases and other
12 things where you're presenting evidence, you know, to
13 offset your client's -- you know, it could be
14 propensity for violence; it could be the propensity
15 to be dishonest. It could be anything. And the
16 Government would come up and say, Well, would your
17 opinion change, if you knew X, Y, and Z? And X, Y,
18 and Z happens to be the material facts relevant to
19 the case that the jury is hearing.

20 And, really, that was with regard to 608.
21 Just to prevent those types of hypothetical
22 questions. With that having been said, Your Honor, I
23 think we're in agreement.

24 THE COURT: Let me see if I can break this
25 down. The reputation stuff, I'm not sure I see

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1 anything on the list. Maybe I'm wrong. Maybe Mr.
2 Castellano wants to argue at this point. But I'm not
3 seeing anything on that that would necessarily go to
4 reputation for truthfulness or for character for
5 truthfulness. So if you brought in a witness going
6 to testify for truthfulness, and the only reason you
7 do that is Mr. Baca is on the stand, right, has been
8 on the stand, or will be taking the stand?

9 MR. LOWRY: Right.

10 THE COURT: So that -- and maybe Mr.
11 Castellano could look through that list and see if
12 there is anything he would want to say: And did you
13 know that he did such-and-such, and that would go to
14 truthfulness.

15 MR. LOWRY: Correct.

16 THE COURT: Assuming he doesn't identify
17 anybody there, I guess I'm not quite seeing the
18 issue.

19 Now, let's switch over to the character.
20 If you decide to put Mr. Baca's character in
21 evidence, then it would seem to me -- and correct me
22 if I'm wrong -- let's say it's his reputation, or
23 somebody's opinion for his peaceful character --

24 MR. LOWRY: Right.

25 THE COURT: -- it would seem to me, then,

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1 the Government would be able to ask that witness
2 about all the violent bad acts that they've listed on
3 their notice. Do you disagree with that analysis?

4 MR. LOWRY: Well, I do, Your Honor. And
5 that's what -- I'm looking at the United States v. --
6 I'm going to botch that name -- Polsinelli -- 649
7 F.2d 793. It's a Tenth Circuit opinion from 1981.
8 And we've quoted it in our brief. And actually, the
9 Tenth Circuit reversed a conviction based on the use
10 of those types of hypotheticals.

11 THE COURT: Well, isn't what happened in
12 that case -- and tell me this -- is if he -- if you
13 put on a witness that says, you know, I've never
14 known the defendant -- I guess his name was
15 Polsinelli -- to have any involvement in drugs. And
16 the Government lawyer then asks that witness, Well,
17 you know, if you knew that he distributed drugs in
18 this case, this distribution of drugs, would that
19 change your opinion any? Or did you know about him
20 distributing drugs here? That would be -- that would
21 not be a proper question. But if he had prior
22 convictions, or if there were prior times that there
23 was evidence that he had distributed drugs or used
24 drugs, or something like that, that would be fair
25 game, right?

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1 MR. LOWRY: Well, that's an interesting
2 question, given the way the case is indicted, because
3 with the racketeering and the VICAR counts, and the
4 proof of the enterprise, I mean, I think that all of
5 those acts are part of this case. So it really
6 becomes hard to separate the past from the present,
7 if you will, under the hypothetical you just gave.
8 You could say, We're going to look back to your past
9 and use that to raise the hypothetical. But it's all
10 sort of in the same basket, if you will.

11 THE COURT: Well, I guess I would think
12 this would be my call, and maybe I need to be
13 educated on Polsinelli, and you can educate me a
14 little bit more. It would be improper, I think, for
15 Mr. Castellano to ask one of your witnesses: Well,
16 but if you knew Mr. Baca tried to knock off the
17 Corrections Secretary, that would not be a proper
18 question of your character witness.

19 On the other hand, if he were to ask the
20 character witness an overt act, even though it's
21 going to have to be -- it is going to be proved up
22 here, if he were to ask a character witness for --
23 let's just take Overt Act No. 6, "That on June 22,
24 Mr. Baca and another SNM Gang member murdered another
25 inmate," it seems to me that would be proper. Why

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1 don't you think about that. If you don't have a real
2 clear answer, maybe think about that, and send me a
3 letter on it.

4 MR. LOWRY: I will.

5 THE COURT: I'd be inclined to think that
6 the Marcantel would be off limits, but other overt
7 acts would be okay.

8 MR. LOWRY: If the Court would indulge me,
9 I'll go back and take a look at it.

10 THE COURT: Yeah, think about it.

11 MR. LOWRY: I understand where you're
12 drawing the distinction.

13 THE COURT: Otherwise, it would seem to me
14 that you're basically going to denude the United
15 States of any cross-examination of one of your
16 character witnesses. I don't know how they would
17 examine him. Do you?

18 MR. LOWRY: Well, I think if they're going
19 to ask a hypothetical, they could ask it without any
20 reference to any specific allegation, as you pointed
21 out, without going into the precise specificity, if
22 you will.

23 THE COURT: Well, they don't have to ask
24 hypothetical questions. This is not an expert. They
25 can actually say: Did you know that -- you offered

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1 an opinion here of your -- of Mr. Baca being
2 peaceful, but did you know that, on June 22, 1989, he
3 and another gang member murdered somebody? Did you
4 know that in forming your opinion -- or well, your
5 opinion?

6 MR. LOWRY: And I think if there was the
7 equivalent of a judicial finding or a court finding
8 or a plea agreement, I wouldn't disagree with you.
9 But I think a lot of these overt acts, they're based
10 on a subjective analysis that didn't lend itself to
11 that kind of finality, in terms of a determination of
12 whether that specific instance of conduct could be
13 attributed to Mr. Baca or not.

14 So that would be a problem for me in the
15 analysis, in looking to give the Government carte
16 blanche to go --

17 THE COURT: Think about it and look at it.
18 Because it would seem to me that the Government
19 doesn't have to prove, for a character witness, the
20 cross-examination, they don't have to prove anything
21 beyond a reasonable doubt or even by a probable
22 cause. They simply have to have a good faith basis
23 for the question.

24 MR. LOWRY: Right. And maybe we could be
25 very close to agreement, but just not there. Because

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1 what I'm thinking in my mind is you could back off a
2 little bit, and not be date specific, time specific.
3 If he was involved with this type of event, an
4 assault, if you will, would that change your mind.
5 Not was he involved.

6 THE COURT: That's the whole fun of a
7 character witness is throwing out those 10 bad acts.
8 Take all the fun out of the cross-examination.

9 MR. LOWRY: That would be our position,
10 Your Honor. I'll go back and look at it.

11 THE COURT: Take a look at it. I'll be
12 ready. Because it's not going to come up until your
13 case anyway. Give that some thought. That's where
14 I'd be inclined to draw the line, that they can't --
15 for example, ask about --

16 MR. LOWRY: Marcantel, Molina, or Rubio.

17 THE COURT: Yeah, probably so. But the
18 other overt acts, they might be able to do.

19 MR. LOWRY: Okay.

20 THE COURT: What else on your motion do you
21 have? What else --

22 MR. LOWRY: That's it, Your Honor. I think
23 we're in agreement.

24 THE COURT: So we'll talk about
25 cross-examination of character witnesses, right?

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1 MR. LOWRY: Correct.

2 THE COURT: Can you think of anything on
3 reputation for truthfulness, any limitations upon it,
4 other than it has to be going to truthfulness?

5 MR. LOWRY: No, I don't, Your Honor.

6 THE COURT: All right.

7 MR. LOWRY: On 609, I think the Government
8 filed a motion. But I think we're in agreement on
9 this one. They didn't oppose with regard to 609.
10 But I think that will be a separate motion that the
11 Government has.

12 THE COURT: Let's see, my memory on the
13 Government's response on the 609, that convictions
14 outside of 10 years, you're not going to use. But
15 you do intend to use convictions within 10 years;
16 correct? Is that what you responded, Mr. Castellano?

17 MR. CASTELLANO: I don't recall. That
18 sounds about right, Your Honor. And I guess the
19 question we'll have to think about is what starts the
20 clock for the 10 years. Some of these -- some of the
21 folks are still in prison on some of those charges,
22 even though they may be older. So I think we'll be
23 well within that time period.

24 THE COURT: Okay. All right. Well, you
25 probably know Mr. Baca's criminal history. And so,

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1 if there is some that you want to quibble with, you
2 might try to bring those to my attention earlier
3 rather than later, if he's going to take the stand.

4 MR. LOWRY: Thank you, Your Honor.

5 THE COURT: Obviously, if he doesn't take
6 the stand, we don't have to worry about it.

7 MR. LOWRY: I don't think it's an issue.
8 Thank you, Your Honor.

9 THE COURT: Mr. Castellano, anything else
10 on this motion? I mean, I've been trying to argue
11 your point. But I mean, do you read the rule on
12 cross-examination of a character witness the way I
13 do?

14 MR. CASTELLANO: Your Honor, I think you've
15 been doing a great job. I don't have anything to add
16 to your arguments.

17 THE COURT: Am I reading this Polsinelli
18 case correctly, or -- it sounds to me like it was a
19 much simpler case, because it looked like a drug
20 distribution case rather than a case that had overt
21 acts pled.

22 MR. CASTELLANO: I think you get down to
23 the: Are you aware, or did you know types of
24 questions for those character witnesses, if they come
25 up.

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1 THE COURT: Well, I'll tell both of you,
2 y'all might just do a little Westlaw search, and see
3 if anybody has had cross-examination of character
4 witnesses in an a overt act case, and where the court
5 has cut it off and where they allow it.

6 I find particularly persuasive, when I'm
7 ruling on evidence questions, is Saltzburg. So if
8 you glance at Saltzburg -- and since he was both a
9 prosecutor and a criminal defense lawyer, he's got a
10 good real world feel for evidentiary issues. And
11 since he is a friend, and my former evidence
12 professor, I find him extremely persuasive. He will
13 sit on my bench up here as we go through trial. So
14 you might take a look and see if he tells us anything
15 on that issue.

16 Anything else on that, Mr. Lowry, on that
17 motion?

18 MR. LOWRY: No, Your Honor.

19 THE COURT: Did anybody else have any
20 comment on this issue, these evidentiary issues?
21 Because they may spill over into your cases as well.

22 All right. So I'm going to put that aside.

23 I think Mr. Baca had one more, Your Honor.

24 MR. LOWRY: He did, Your Honor. It's 1540.
25 It's the motion in limine to prohibit the Government

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1 from questioning Jerry Armenta about Mr. Baca's
2 involvement in Counts 6 and 7, which is the Molina
3 murder.

4 THE COURT: All right. Tell me -- refresh
5 my memory as to what Mr. Armenta would say and how he
6 would know what he's saying?

7 MR. LOWRY: Well, that's an interesting
8 issue, Your Honor.

9 Mr. Armenta was videotaped in, I think it's
10 mid October of 2015, in the State case. And during
11 that videotaped interview, he walks the State
12 investigators through the Molina event. And at no
13 time did he mention Mr. Baca at all, until he had
14 gone through it. And then he was asked a pointed
15 question by the folks that were talking to him, if
16 Mr. Baca had anything to do with this at all.

17 And his answer was interesting. But more
18 to the point, he said, "I didn't know anything about
19 that rumor" -- he describes it as a rumor that was
20 going in the pod -- until after the event altogether.
21 And so it couldn't be in furtherance of any kind of
22 conspiracy because he had no prior knowledge
23 whatsoever. He talks about what he had heard from
24 other people in the pod later, after the fact.

25 And so we'd ask just that that portion of

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1 the video, if the Government is going to use it, and
2 then Mr. Armenta's testimony to the extent the
3 Government is going to rely on it, not go into
4 anything he learned after the fact, from the rumor
5 mill, that was taking place down in Southern at the
6 time.

7 We've heard ample testimony -- there is all
8 kinds of reasons why people might want to deflect
9 responsibility for that event away from themselves
10 and onto my client. But, in any event, it's not in
11 furtherance of any kind of conspiracy. It's an
12 after-the-fact comment, one that wasn't based on any
13 kind of firsthand knowledge whatsoever.

14 THE COURT: Okay. Thank you, Mr. Lowry.

15 Any other defendant want to talk about this
16 motion by Mr. Baca?

17 Mr. Castellano, are you going to handle
18 this one?

19 MR. CASTELLANO: Yes, Your Honor. I
20 think -- I haven't looked at Mr. Armenta's more
21 recent statements lately. And I think we'll have to
22 delve into the basis of his knowledge. If it's just
23 rumors from uninvolved people, that's one thing. But
24 if it's a rumor from somebody who is involved with
25 the conspiracy, then that would be a statement that

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1 falls under the Smalls case, because it would be a
2 statement against interest, where somebody tells Mr.
3 Armenta how he got involved in the case, or how Mr.
4 Baca was involved with the case.

5 So I think it's something we actually have
6 to drill down a little bit more into to get to the
7 bottom of.

8 THE COURT: Do you agree with what Mr.
9 Lowry said about -- did he describe accurately what's
10 on the video?

11 MR. CASTELLANO: I haven't seen the video
12 in a while, Your Honor. I forget. What he said
13 sounds familiar. I just don't recall the specifics.

14 THE COURT: I guess my reaction -- and tell
15 me if it's wrong -- is that, if that is a description
16 of the video, that's not going to be enough to
17 probably come in. And that part of the video might
18 not be, and should not be admissible. But if you get
19 Mr. Armenta on the stand, and then we just have to
20 listen to what his firsthand knowledge is, you'd have
21 to lay some foundation about Mr. Baca's involvement
22 before Mr. Armenta testified.

23 Your thoughts?

24 MR. CASTELLANO: I agree, that's the
25 correct approach, Your Honor.

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1 THE COURT: All right. Anything else you
2 want to say on this motion then?

3 MR. CASTELLANO: No, sir.

4 THE COURT: All right. Anybody else want
5 to comment on Mr. Armenta's tape or the taped
6 interview in the state trial, or what he might say on
7 the stand?

8 All right. Does it sound like that's a
9 pretty good dividing line, Mr. Lowry?

10 MR. LOWRY: Well, Your Honor, you know, I
11 know that the United States is very fond of the
12 Smalls opinion. But I think they represented that
13 right; the opinion is based not on a co-conspirator
14 hearsay analysis. The Smalls case really is a
15 statement against penal interests. And in that case,
16 the two defendants were talking about their direct
17 involvement in a homicide. And even -- I think as
18 Glendell Cook (phonetic) was talking about the
19 defendants' participation, as they participated
20 together, in real-time, with the strangulation of
21 another inmate. And I think that's just a far cry --

22 THE COURT: I guess what it would do is --
23 let's say I'm analyzing the tape, right; put the tape
24 aside --

25 MR. LOWRY: Right.

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1 THE COURT: If we get Mr. Armenta on the
2 stand, and he can testify about where he heard the
3 statement that Mr. Baca was involved. So that we
4 have somebody that's part of the conspiracy, and then
5 he was able to testify. We come in a co-conspirator,
6 and what Smalls does is it solves the Bruton problem
7 for that statement, right?

8 MR. LOWRY: Yes.

9 THE COURT: That's all it solves. It
10 doesn't help us at all with the admissibility under
11 the hearsay rules. It only satisfies the
12 confrontation issue or the due process issue?

13 MR. LOWRY: I don't disagree with that,
14 Your Honor. But here's where I have a real problem
15 with this hypothetical issue of what Mr. Armenta
16 might say when he's in the witness box. We already
17 know what he's going to say, because he said it in a
18 videotaped interview.

19 THE COURT: It's your description of that,
20 I think, that Mr. Castellano and I agree that would
21 not come in. If he can't do any better than that on
22 the stand, then that wouldn't come in.

23 MR. LOWRY: Correct. I would just say, if
24 he said anything contrary to what he said in the
25 videotape about something he mysteriously heard a day

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1 beforehand, while he's in the witness box --

2 THE COURT: What do I do about that,
3 though? That's not an evidentiary problem. It's
4 just you -- just got to impeach him, right? And
5 that's tricky.

6 MR. LOWRY: Well, I have to impeach him.

7 My colleagues have a duty of correcting any --

8 THE COURT: Was the statement under oath?

9 MR. LOWRY: -- false testimony.

10 No, it wasn't, Your Honor. But I don't
11 think -- he's given a number of statements. He's
12 never indicated that he had prior knowledge. I would
13 be highly suspicious, to the point of incredulous, if
14 he testified to that effect at this point.

15 THE COURT: Well, you wouldn't be too
16 surprised, or you wouldn't try keep it out.

17 MR. LOWRY: I want to vitiate the problem.

18 THE COURT: You're prewarning me you're
19 going to be surprised, right?

20 MR. LOWRY: Exactly. I'd be floored. You
21 might see me pass out.

22 THE COURT: I remember those days. Wasn't
23 it New York you always had to feign surprise to get
24 in rebuttal evidence?

25 All right. So based upon the

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1 representations of the video, I'll keep it out. If
2 Mr. Armenta doesn't have anything more than what he's
3 saying in the video, then keep it out, too. If Mr.
4 Castellano looks at the video, and it's more, then I
5 may have to revisit the issue. But that will give
6 you some guidance in getting ready for trial.

7 And then, if Mr. Armenta, all of a sudden,
8 remembers a lot more evidence of Mr. Baca's
9 involvement in the murder, then we'll have to deal
10 with that at the time. If we're at that point, if we
11 can figure out a way to -- tip me off here at the
12 bench, so that I can see what's coming, before we
13 just have it blurted out, it would be good. So
14 everybody try to be alert to see if you can keep me
15 posted as the trial evidence develops on that point.

16 All right. I think we're ready to go to
17 Carlos Herrera's motion in limine on bad acts. Let
18 me pull this up. This is 1540 -- I can't read. All
19 right. I've got 1549.

20 All right. Ms. Bhalla, you've got some
21 preliminary remarks you want to make, or do you want
22 to hear from the Government first, or do you want to
23 do both?

24 MS. BHALLA: You know, Your Honor, I think
25 I am anxious to hear from Mr. Castellano about this.

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1 But I will just say, looking at the first
2 page alone, some of these acts were committed when
3 Mr. Herrera was in the juvenile detention facility,
4 and he was 13 years old. You know, I took the
5 Court's admonition about the meat cleaver pretty
6 seriously yesterday. And so I went back and really
7 tried to narrow this down. I certainly can see if
8 you or the Government may be able to put forth some
9 evidence, and attempt to lay the appropriate
10 foundation. But I think that some of these are well
11 outside anything having to do with any sort of
12 enterprise evidence. So --

13 THE COURT: Did you go through and do what
14 Mr. Castellano has been doing about matching up some
15 of these with overt acts?

16 MS. BHALLA: I tried to do that. I had a
17 tough time finding them. I mean, there were a couple
18 that I could see, maybe. That's why I'm curious to
19 hear from Mr. Castellano on that. I mean, I
20 identified maybe four or five out of the 36. So I'd
21 like to see what the Government has to say about
22 that, Your Honor, to try and see if I can narrow this
23 a little bit.

24 THE COURT: All right. Anything else from
25 a preliminary statement you want to make?

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1 MS. BHALLA: No, Your Honor.

2 THE COURT: Thank you, Ms. Bhalla.

3 All right. Mr. Castellano. Have you done
4 the same thing with your letter, or Ms. Armijo's
5 letter to Mr. Herrera's counsel -- I mean,
6 Mr. Herrera's counsel on this letter?

7 MR. CASTELLANO: I did, Your Honor.

8 Admittedly, I had a tougher time with Mr. Herrera's,
9 because he's not charged with overt acts in the RICO
10 indictment.

11 THE COURT: At all?

12 MR. CASTELLANO: I believe that's correct.
13 Let me double-check.

14 THE COURT: Let me start first with the
15 question that I've been asking you about the 404(b).
16 Is the Government trying to get any of this evidence
17 in, filtered through 404(b)?

18 MR. CASTELLANO: I'm having a tougher time
19 with Mr. Herrera's, because I'm going to have to go
20 back and look at the supporting documentation.

21 But let me start with the things I think we
22 can strike now. It's not many.

23 THE COURT: Okay. And by "strike" you mean
24 these are things that the Government will not attempt
25 to prove or introduce against Mr. Herrera?

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1 MR. CASTELLANO: That's correct.

2 The first is the January 12, 1994 incident.

3 THE COURT: Auto theft.

4 MR. CASTELLANO: If Ms. Bhalla represents
5 that the 1991 incidents were when Mr. Herrera was a
6 juvenile, I'll agree to strike those now.

7 THE COURT: Are those both juvenile, Ms.
8 Bhalla?

9 MS. BHALLA: Your Honor, the whole entire
10 first page is juvenile. The 1991 incidents, he was
11 13 years old. The '94 incidents, he was 15 years
12 old. And then, when you switch to January -- let's
13 see, no, March 14, he was 16. His birthday is in
14 February. And then he was 16 for the rest of the
15 page. I mean, if you look at the first line, it's
16 pretty clear he was a juvenile, because it notes that
17 he was in the detention home. So --

18 MR. CASTELLANO: Looking at the 1994, at
19 the bottom of the page, it indicates that Mr. Herrera
20 was in the Department of Corrections. So I'm
21 assuming --

22 THE COURT: How would he have been in the
23 Corrections -- in the custody of the Corrections
24 Department as a juvenile?

25 MS. BHALLA: I'm a little confused about

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1 that. And I did try and find that out. There was
2 some issue in the Juvenile Detention Center with him
3 at that time. But I'm pretty confident that he was
4 16 at the time. So I'm not sure if it's a mistake
5 with the Government's letter. But I did talk to my
6 client about that. And I'm pretty sure he was 16,
7 Your Honor.

8 MR. CASTELLANO: He could have been
9 adjudicated as an adult. So that is possible.

10 Like I said, this one -- with these, I was
11 not able to look at the substantiating documentation
12 last night. I reviewed all the letters, but not the
13 documents underlying them.

14 THE COURT: Well, do you know if he was
15 adjudicated as an adult for that?

16 MS. BHALLA: I think that he's a little
17 unclear about that, Your Honor. And unfortunately, I
18 don't have access to those records. So I wasn't able
19 to look that up.

20 THE COURT: Well, I don't know enough about
21 the SNM Gang, but do they allow juveniles or
22 associates into the gang?

23 MS. BHALLA: Not that I'm aware of, or not
24 that's been alleged against my client, Your Honor.

25 THE COURT: What's the Government's

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1 position on that? Do you think they allow juveniles,
2 or they let them be associates in some way, so they
3 would help further the criminal activities?

4 MR. CASTELLANO: I'm not aware of a
5 prohibition on juveniles coming into the SNM Gang, as
6 long as they can put in the work. I believe
7 Frederico Munoz may have been a juvenile when he
8 joined the gang. I believe Eugene Martinez was also
9 very young when he joined the gang.

10 THE COURT: I guess my thoughts are: A bad
11 act is a bad act. It doesn't really matter whether
12 it's a juvenile or not. Mr. Castellano may be
13 willing to take off some of these because he doesn't
14 have any evidence that they were in furtherance of
15 the gang. But I'm not sure that just him being a
16 juvenile is going to take it off.

17 MS. BHALLA: I can understand that, Your
18 Honor. I do think, though, that two things to keep
19 in mind, when we're looking at this, is the
20 Government is going to have to prove in some capacity
21 that's related to the enterprise, number one; and
22 number two, even if that initial burden may be met,
23 there is still a 403 balancing test that we're going
24 to have to look at. And we can deal with that later,
25 if Mr. Castellano wants to continue agreeing which

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1 ones we won't be arguing about, that would be great.

2 THE COURT: Well, he's only taken off this
3 January 12th one so far. After hearing the exchange,
4 any others you want to take off, Mr. Castellano?

5 MR. CASTELLANO: Yes, Your Honor. I've
6 stricken the first two, 1991, as well.

7 THE COURT: September 24, 1991 is off?

8 MR. CASTELLANO: Yes.

9 THE COURT: And also November 6 is off,
10 January 12 is off. Any others?

11 MR. CASTELLANO: Not on that page.

12 THE COURT: Not on that page. Okay.

13 What was the age of Mr. Herrera in January
14 of 1994? Is he going to be 15?

15 MS. BHALLA: 15.

16 THE COURT: All right. Going to page 2.

17 MR. CASTELLANO: Toward the bottom of the
18 page, there is an entry on November 3, 1999.

19 MS. BHALLA: Hold on. I'm sorry.

20 THE COURT: See, it's struck out there.
21 And September 8 as well.

22 MS. BHALLA: I'm sorry. Let me -- are we
23 on the second page?

24 THE COURT: We are, 2 of 4.

25 MS. BHALLA: Oh, okay, I see it. Thank

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1 you.

2 THE COURT: Okay.

3 MR. CASTELLANO: That's November 3, 1999,
4 and September 8 of 2000.

5 THE COURT: Correct.

6 MS. BHALLA: Now, I don't know if the Court
7 wants to -- I did go back to try to look at some of
8 these records.

9 THE COURT: These are just gifts. I mean,
10 he's just not going to put these two in. So he's
11 just listing right now the ones he's just dropping.

12 MS. BHALLA: I understand, Your Honor.
13 Thank you.

14 I just meant there were a couple on the
15 list that aren't crossed off that I do have some
16 information on.

17 THE COURT: Let's hold off. Let's get Mr.
18 Castellano's -- sort of the universe here, and then
19 we'll see what we're going to do with them. Go
20 ahead, Mr. Castellano.

21 MR. CASTELLANO: The next is on the
22 following page, October 6, 2011.

23 THE COURT: Okay. The pornography?

24 MR. CASTELLANO: Yes.

25 THE COURT: So that one is out.

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1 So it's actually three pages. Okay,
2 anything else, Mr. Castellano?

3 MR. CASTELLANO: That's it for right now,
4 Your Honor.

12 MR. CASTELLANO: I think so. I have to
13 look at these more closely with an eye towards the
14 404(b).

25 MR. CASTELLANO: And I agree with that

1 approach, Your Honor. If there is a change, we'll
2 notice that in our letter to defense counsel.

3 THE COURT: All right. Do you have on
4 here -- because I guess Ms. Bhalla was saying that
5 she didn't -- did you see any of these that were
6 overt acts, or you just said you had a hard time --

7 MS. BHALLA: No, Your Honor. I mean, Mr.
8 Herrera is not named in any of the overt acts, as
9 some of the other defendants. So I -- you know, I'm
10 trying to have to look at this in sort of a more
11 loose fashion, in terms of whether or not this would
12 fit into some sort of enterprise theory.

13 You know, I think that maybe there are four
14 or five that could potentially be applicable,
15 depending on what evidence the Government submits.
16 But some of these, I think, are fairly obviously not
17 related to enterprise. And I say that because I was
18 able to go back and look through some of these
19 records, to read about the individual incidents. And
20 I have a little more information, perhaps, than the
21 Government does at this point, about some of those
22 individual incidents. And I'm willing to talk about
23 those. But we can also see how this pans out. Maybe
24 the Government wants more time to look at this. I'm
25 open to how the Court wants to handle it.

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1 THE COURT: Well, let me make a suggestion:
2 Would you be willing, if Mr. Castellano would drop
3 everything but your five, and maybe at least for
4 ruling and getting ready for trial, you'd identify
5 which five you think they may have a shot at; he
6 drops the other, and then he can focus then on those
7 five, and see if he even wants to bring those in?

8 MS. BHALLA: I think that's fair, Your
9 Honor. I mean, I'm not going to certainly concede
10 that they're admissible.

11 THE COURT: Right.

12 MS. BHALLA: But yes.

13 THE COURT: Okay. Well, that might make
14 Mr. Castellano's work easier. And it's probably
15 going to be overnight. Why don't you identify the
16 four or five that you think are probably on the
17 table, and then he can maybe see if he's ready to
18 concede, maybe first thing in the morning, or
19 tomorrow, on the rest, that for the present time he's
20 not going to try to put them in?

21 MS. BHALLA: Okay, Your Honor.

22 THE COURT: Which ones are they?

23 MS. BHALLA: If you go to page 2: "1998,
24 Mr. Herrera voted to bring Gene Martinez into the SNM
25 Gang.

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FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

1 THE COURT: Okay.

2 MS. BHALLA: Possibly the February 23, 1999
3 incident. I haven't found any records related
4 directly to that. But just -- you know, I'd be
5 curious to see what they had.

6 THE COURT: Okay.

7 MS. BHALLA: I may have overstated how many
8 I found to be relevant, or possibly relevant.

9 You know, there is a lot of stuff about
10 drug use in here. You know, the Government may think
11 that that is indicative of enterprise. But I would
12 argue that any sort of minor possession isn't
13 necessarily related to the enterprise. And there are
14 several on here. And I think perhaps those, the
15 Government may want to -- I don't know, we may argue
16 about those. But that's really it, in terms of what
17 I found, Your Honor.

18 THE COURT: Well, let's do this: Why
19 don't -- Mr. Castellano, why don't you look maybe a
20 little closer at Mr. Herrera's, and see how much you
21 think we could -- just for purposes of preparing for
22 trial -- how much we can take off the table. And
23 then if you need to leave some on to look at more
24 closely, or if you and Mr. Acee can look at them
25 overnight, and maybe tell us which ones you're going

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119 East Marcy, Suite 110
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(505) 989-4949
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1 to take off, prepare to take off, what you want to
2 leave in play, and maybe we can at least narrow it.
3 And then we can go, then, with the structure that
4 we've used for January 22, as we get a little closer
5 and see what's left.

6 Does that make sense?

7 MR. CASTELLANO: It does, Your Honor. I
8 don't know if I'll be able to find all the
9 substantiating documents tonight. I'll discuss it
10 with Agent Acee. I can tell the Court, most of
11 the --

12 THE COURT: Maybe you could at least tell
13 us which ones you want to play with.

14 MR. CASTELLANO: I'll give the Court a
15 preview.

16 THE COURT: Some of these you look at, and
17 you don't want to pursue, maybe we can just take them
18 off the table?

19 MR. CASTELLANO: Just about everything
20 related to drugs, we will probably --

21 THE COURT: You want to leave in play?

22 MR. CASTELLANO: Yes, because --

23 THE COURT: That's what SNM does, is drugs?

24 MR. CASTELLANO: In particular, related to
25 Mr. Herrera; his father and brother were SNM Gang

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1 members, and his mother was known to sell drugs both
2 through the 18th Street Gang and to the SNM. So
3 that's where he has an additional connection to
4 drugs.

5 THE COURT: Our breaks sort of worked out a
6 little odd today. I need to give Ms. Bean a break,
7 and it doesn't make any sense to come back. So let's
8 bring it to an end.

9 Let me make a few comments before we take a
10 break. I'm not able to do sort of a standard
11 pretrial conference, because we're doing this over a
12 month in advance. So we're going to have to do
13 portions of our pretrial conference on a rolling
14 basis. So get out our pieces of paper here and write
15 this down. I'm not asking for any more motions. I'm
16 not asking for any more letters. You can raise these
17 as we go. If you want to send me a letter or
18 something, that's fine.

19 But keep in mind, I would like to help you
20 in advance of trial on a few select categories that I
21 would normally handle at a pretrial conference.
22 First, exhibits. And I'd be willing to talk about
23 those exhibits in a formal way. But it may be a
24 little early to do that. So exhibits; I'd like to
25 address any issues I can, either in hearings this

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1 week, or in the future about exhibits, so keep that
2 in mind.

3 Same way with witnesses. That's one reason
4 I switched to the bad acts at this point because I
5 think that's going to implicate both exhibits and
6 witnesses, so any issues and disputes on that. I
7 want to try to help you resolve any issues on that as
8 much as possible before trial. I know we can't
9 script out the trial. But we can try, and that will
10 make it easier on everybody to try the case.

11 Keep in mind discovery issues. Even if I'm
12 not going to allow discovery, I'd like to deal with
13 those in advance. Just any evidentiary issue.

14 I think the deadline for motions in limine
15 have come and gone. So I'm not inviting or asking
16 any more motions in limine. But at the same time, I
17 think it helps us all if I can rule on evidentiary
18 issues before trial. And the same thing with Daubert
19 issues. So anything that falls into those
20 categories, while I'm down here -- you know, if I can
21 help you with those in any way, those are the kind of
22 things I would normally deal with at a pretrial
23 conference, we knock it out; we're close to trial.
24 Here, we're five weeks from trial. So some of these
25 issues, we've got to plow through other motions to

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1 get to it. But keep those in mind, if necessary, and
2 send me a letter, whatever you've got to do. But if
3 we can also just raise them. I want to try to deal
4 with as many of those before trial as we can, because
5 I think, A, it will help you prepare for trial; B, it
6 will help me to make a more informed decision.

7 All right. I appreciate everybody's hard
8 work. Y'all have a good evening. See you tomorrow.

9 (The Court stood in recess.)

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119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

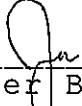
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3 UNITED STATES OF AMERICA
4 DISTRICT OF NEW MEXICO
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6

7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
8 Official Court Reporter for the State of New Mexico,
9 do hereby certify that the foregoing pages constitute
10 a true transcript of proceedings had before the said
11 Court, held in the District of New Mexico, in the
12 matter therein stated.

13 In testimony whereof, I have hereunto set my
14 hand on December 26, 2017.

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18 
19 Jennifer Bean, FAPR, RMR-RDR-CCR
20 Certified Realtime Reporter
21 United States Court Reporter
22 NM CCR #94
333 Lomas, Northwest
Albuquerque, New Mexico 87102
Phone: (505) 348-2283
Fax: (505) 843-9492
23
24
25

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

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